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No. 06-___

IN THE

Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME,

Petitioner,

v.

JOAN LASKOWSKI, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether federal taxpayers have standing under *Flast v. Cohen*, 392 U.S. 83 (1968), to seek an injunction ordering a private religious university to pay the Government, the alleged constitutional violator, an amount of money equal to an expired and fully expended government grant, where the past expenditure of that grant allegedly violated the Establishment Clause and the Government does not want the money.

II. Whether *Flast v. Cohen* should be overruled if the court of appeals' novel theory of taxpayer standing is consistent with that precedent.

PARTIES TO THE PROCEEDINGS

The parties before this Court are petitioner, the University of Notre Dame, and respondents Joan Laskowski and Daniel M. Cook. The Secretary of Education, Margaret Spellings, who was sued in her official capacity as Secretary of the United States Department of Education,[1] is also a party to this action.

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[1] While this matter was pending before the court of appeals, Secretary Spellings was substituted for her predecessor in office, Rod Paige, who was originally named as a defendant. *See* Federal Rule of Appellate Procedure 43(c)(2).

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PETITION FOR WRIT OF CERTIORARI

The University of Notre Dame respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-26a) is reported at 443 F.3d 930. The order of the court of appeals denying petitions for rehearing and rehearing en banc filed by Notre Dame and the Government and the accompanying order clarifying the original opinion (Pet. App. 1a-3a) are reported at 456 F.3d 702. The opinion of the district court granting defendants' motion for summary judgment on mootness grounds (Pet. App. 27a-31a) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 13, 2006. The United States Government's and University of Notre Dame's petitions for rehearing were denied on July 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2, of the Constitution provides in relevant part:

The judicial Power shall extend to [ ] Cases . . . [and] Controversies.

STATEMENT

1. The court of appeals erroneously and unjustifiably expanded "'the narrow exception that [*Flast v. Cohen*, 392 U.S. 83 (1968)] created to the general rule against taxpayer standing.'" *Daimler Chrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1864 (2006) (quoting *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988)). This Court concluded in *Flast* that taxpayers had standing to seek an injunction against specific congressional expenditures in violation of the Establishment Clause because the alleged "injury" was the "'extract[ion]

and spen[ding]' of 'tax money' in aid of religion." *Id.* at 1865 ("[A]n injunction against the spending would of course redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally."). *Flast* was not based on a financial interest in the federal Treasury, and, as such, the status of a federal or state taxpayer has not provided standing in any other situation. *Id.* at 1864-65.

The court of appeals, in contrast, expressly vested taxpayers with a financial interest in the Treasury. The court resurrected an alleged former Establishment Clause violation concerning long ceased expenditures under a statute that expired almost two years ago. The court conceded that "insofar as the money has been spent for forbidden purposes, say to indoctrinate teachers or students in Catholic dogma, that injury *cannot be rectified.*" Pet. App. 5a (emphasis added). Nonetheless, the court concluded that the federal fisc could be replenished and that Plaintiffs had standing to assert a claim in the amount equal to Congress's expenditure against the past *recipient* of federal funds. Even though Plaintiffs *concededly* have *no* redress against the Government, which allegedly committed this violation, and the court's "remedy," in fact, would reward the Government for its allegedly unconstitutional behavior, the court found a live "Case" or "Controversy."

The court's misapplication of *Flast* predictably wreaks havoc with this Court's standing and justiciability doctrines and conflicts with numerous circuit courts. Immediate review is warranted.

2. Established in 1993, the University of Notre Dame's Alliance for Catholic Education Program ("ACE") is a graduate education program designed to develop motivated and committed young educators and to meet the needs of some of our country's most underserved schools. The ACE program spans two calendar years and culminates in its participants receiving a Master of Education degree. S.A. 6,

¶ 3.[2] During the two summers of the program, ACE students participate in an innovative teacher-training curriculum taught on Notre Dame's campus and teach in "at risk" programs of local public and private schools. During the academic year, ACE participants accept positions as full-time teachers in underprivileged Catholic elementary and secondary schools throughout the country. Most of the schools served are poor, inner-city schools that face a shortage of qualified teachers and qualify for services under Title I of the federal Elementary and Secondary Education Act. The ACE program has been enormously successful, winning numerous awards and accolades for its success in providing high-quality teachers to underserved areas and for the number of its graduates who stay in teaching, which is almost twice the national average.

Notre Dame, having encountered practical constraints prohibiting further expansion of the ACE program, decided to teach other colleges and universities how to replicate the program. *Id.* at 7, ¶ 9. The purpose of the replication program was to assist other institutions in establishing similar programs to train and to produce qualified teachers for underserved communities. Notre Dame, after contacting dozens of colleges and universities, selected four institutions to participate in the replication program: Valparaiso University, Providence College, Loyola Marymount University, and the University of Portland.

Notre Dame sought funding for the initiative from private foundations, pledged its own resources, and relied on the partnering institutions ("partners") to secure their own sources of funding. *Id.* at 7, ¶ 11. Notre Dame also applied for federal funds. The Higher Education Amendments of

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[2] Pages from Notre Dame's Supplemental Appendix filed in the court of appeals are herein designated "S.A. ___"; pages from the Government's Separate Appendix are herein noted as "Sep. A. ___."

1998, *inter alia*, noted a need to "improve the quality of the current and future teaching force by improving the preparation of prospective teachers and enhancing professional development activities," and a need to "recruit highly qualified individuals . . . into the teaching force." 20 U.S.C. § 1021(a)(2), (4). In 1999, under Title VII of that provision, Congress earmarked $500,000 in its fiscal year budget to Notre Dame for the replication program.[3] Consolidated Appropriations Act of 1999, Pub. L. No. 106-113, § 309, 113 Stat. 1501, 1501A-261 to 262. The money was earmarked for only secular education projects, 34 C.F.R. § 75.532 (2000), and only four of the 51 institutions that received funding under Section 309 were religiously affiliated. § 309, 113 Stat. at 1501A-261 to 262. Overall, Congress appropriated more than $1.5 billion for use in higher education. *Id.* at 1501A-252. The grant to Notre Dame represented less than 1/3 of one percent of that amount.

The Department of Education ("Department") serviced the congressional earmark and invited Notre Dame to apply for the grant funds through the Fund for the Improvement of Postsecondary Education. Sep. A. 1-2. Before the Department awarded the funds, it required Notre Dame to provide detailed documentation for its review to ensure the money would be spent as Congress intended. *Id.* The Department awarded the grant in 2000, subject to federal regulations that prohibited the expenditure of any funds for religious purposes. *See* 34 C.F.R. § 75.532. The grant expired on December 31, 2004.

Notre Dame and the partners were fully aware of and followed the prohibition against using grant funds for

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[3] This amount was subsequently reduced to $462,500. Sep. A. 16, ¶ 4.

religious purposes.[4] S.A. 9, ¶ 15. The vast majority of the grant was disbursed to and spent by the partners. *Id.* at 9, 10, ¶¶ 15, 20. The partners used the grant primarily to pay a portion of their directors' salaries, with a smaller amount being spent by some for various other secular expenses, such as recruiting, travel, office expenses, and stipends for professional mentors. *Id.* at 8, ¶ 12. Notre Dame itself spent a portion of the funds to pay for secular expenses incurred in replicating the ACE program, such as salaries, office expenses, and travel costs. *Id.* The grant funds were not used for the actual ACE program at Notre Dame.[5] *Id.*

3. In December 2003, over three years after Notre Dame began receiving and disbursing grant funds, Plaintiffs, two alleged federal taxpayers, sued the Secretary of Education ("Secretary"), alleging the grant violated the Establishment Clause. The sole request for relief was an injunction against the Secretary to enjoin her from continuing to pay the grant. Notre Dame was permitted to intervene, but Plaintiffs did not amend their complaint to assert any alternative or additional claims or to seek any relief against Notre Dame.

Plaintiffs took no action to expedite the case, nor did they seek a preliminary injunction. Plaintiffs, instead, twice filed successful motions to extend the deadline to conduct discovery and twice filed successful motions to extend the summary judgment briefing schedule. Consequently, while the case was pending before the district court, Notre Dame

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[4] The Department, after conducting a three-day on-site audit of the grant funds, determined there was no evidence that any federal dollars were spent on religious activities.

[5] The D.C. Circuit, however, has held that federal dollars could be used by participants for certain aspects of Notre Dame's ACE program, notwithstanding the presence of some allegedly religious content in program. *Am. Jewish Cong. v. Corp. for Nat'l & Comty. Serv.*, 399 F.3d 351, 358-59 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1132 (2006).

and the partners spent all federal dollars by December 9, 2004, *id.* at 10, ¶ 20, and the grant expired by its own terms on December 31, 2004. Sep. A. 17, ¶ 5. Because the grant was a one-time-only congressional earmark, now expired, and the entire grant amount had been spent, an alleged ongoing constitutional violation no longer existed.

In January 2005, Notre Dame and the Secretary moved for summary judgment and sought dismissal of Plaintiffs' action as moot. Plaintiffs agreed that their action against the Secretary to enjoin payment of the grant was moot. Plaintiffs, however, propounded, for the first time in their opposition to summary judgment, that the court could enjoin the Secretary to recoup funds from Notre Dame. The district court rejected Plaintiffs' position and dismissed the action as moot. The court held "[b]ecause the challenged Grant appropriation no longer exists, there ordinarily can be no real controversy as to its validity." Pet. App. 29a.

4. In a sharply divided decision, the court of appeals vacated and remanded Plaintiffs' action, concluding that some "meaningful relief" could be provided to them. The majority agreed that "insofar as the money has been spent for forbidden purposes, say to indoctrinate teachers or students in Catholic dogma, that injury cannot be rectified." *Id.* 5a. But, the majority stated, "What can be rectified . . . is the depletion of the federal treasury by the amount of grant. It can be rectified simply by the restoration of the money to the U.S. Treasury." *Id.* 5a-6a.

The majority, however, took issue with Plaintiffs' request for relief. Recognizing that the district court could not enjoin the Secretary to recoup such funds, as such an action is precluded by this Court's opinion in *Heckler v. Chaney*, 470 U.S. 821 (1985), and is "well outside judicial competence," the majority determined Plaintiffs' suggested procedure was "needlessly complex." Pet. App. 7a. The majority thus held that the district court simply could order Notre Dame directly to return an amount of money

equivalent to the grant to the Treasury. *Id.* This relief was never requested by Plaintiffs, nor had Plaintiffs ever asserted any claims against Notre Dame. The court dismissed these facts out of hand as mere "details" that have no "practical significance." *Id.* 8a-9a.

Judge Sykes dissented. She stated that the majority's "newfangled remedy," which "vest[s] taxpayers with a unique sort of qui tam-like authority to sue private parties for reimbursement of the Treasury when the government is alleged to have committed an Establishment Clause violation, ... is a dramatic expansion of taxpayer standing." *Id.* 15a. As Judge Sykes pointed out, taxpayer standing "is not premised upon injuries to the public fisc" as "a taxpayer's interest in money in the Treasury is too diffuse[] to support standing to sue in federal court." *Id.* 21a. Once Plaintiffs' interest in curing the constitutional violation and any available remedy against the Secretary were mooted, so too was Plaintiffs' case. *Id.* Moreover, Judge Sykes noted that the majority achieved its remedy against Notre Dame by relying on restitution, a "private law equitable doctrine that orders liability and remedies between private individuals based on unjust enrichment." *Id.* 18a. This substantive claim for relief, Judge Sykes explained, "has no application in a suit by taxpayers raising an Establishment Clause challenge to a congressional appropriation. It certainly cannot operate as the sole basis for standing in an otherwise moot taxpayer suit." *Id.*

5. By a vote of 6-3 (with two judges recused), the court of appeals denied petitions for rehearing en banc filed by Notre Dame and the Government. Judges Manion, Kanne, and Sykes voted to rehear the case en banc; Judges Ripple and Williams recused themselves.

Two judges, furthermore, apparently voted to deny rehearing en banc not based on the merits of the majority's decision, but because they concluded this Court's review is necessary. Judge Easterbrook in concurring in the denial of

rehearing en banc in *Freedom From Religion Foundation, Inc. v. Chao*, another Establishment Clause taxpayer case, specifically referred to this case, noting that the issue of taxpayer standing "is both recurring and difficult" and that there "is considerable force . . . in the standing analysis of Judge Sykes's dissent." 447 F.3d 988, 989 (7th Cir.) (Easterbrook, J., concurring), *petition for cert. filed*, 75 U.S.L.W. 3065 (No. 06-157, Aug. 1, 2006). He continued, with reference to this case: "Two divided decisions on related matters that put the judicial and the political branches of the federal government at odds imply the wisdom of further review," but that the Supreme Court is the appropriate forum to hear these cases. *Id.*; *see also id.* at 988 (Flaum, C.J., concurring in denial of rehearing because Supreme Court review is necessary to clarify the limits of taxpayer standing).

REASONS FOR GRANTING THE PETITION

The court of appeals held that a live "Case" or "Controversy" concerning whether the federal government violated the Establishment Clause by providing a teacher-education grant to Notre Dame existed, although the grant expired well before the district court's decision. The court so held, even though Plaintiffs concededly have no redress against the Government, which allegedly committed this violation, and the "restitutionary" remedy created by the court against Notre Dame would not benefit Plaintiffs, but would only benefit the *Government*, the alleged constitutional violator. Under the court's expansive and utterly illogical interpretation of *Flast v. Cohen*, 392 U.S. 83 (1968), Article III thus purportedly empowers federal courts to adjudicate cases where plaintiffs are suffering no injury and have no financial stake in a favorable resolution, where the defendant that allegedly violated the Constitution can only benefit financially if the plaintiffs prevail on the merits, and where the only potential "Controversy" is between the Government and the private intervenor concerning whether

an amount equal to the federal grant should be provided to the federal Treasury.

As simply stating the court's holding reflects, the decision below improperly converts *Flast*'s limited grant of taxpayer standing into an exception to virtually every justiciability requirement of Article III. First, it violates basic mootness requirements because the allegedly unconstitutional spending ceased long ago and federal courts are "not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998). Second, it ignores the "irreducible minimum" of Article III standing—direct injury in fact—by granting standing to plaintiffs who would suffer neither religious nor financial injury if Notre Dame retained the $500,000 in grant money, rather than providing "restitution" in that amount to the federal government. *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 102-03 (1998). Third, it violates the basic purpose of Article III standing requirements—"defin[ing] the role assigned to the judiciary in a tripartite allocation of power"—by authorizing a "remedy" that intrudes directly into the political branches' plenary control of the federal purse, by allowing plaintiffs to force "reimbursement" to the Treasury that the Treasury does not want or seek. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 481 (1982) (quoting *Flast*, 392 U.S. at 95). Finally, Plaintiffs here do not even satisfy the necessary, although insufficient, threshold requirement of standing—"concrete adverseness" between the parties—because the interests of Plaintiffs and the federal government are now perfectly aligned, since the Government will benefit (at Notre Dame's expense) from a finding of a constitutional violation. *United States v. Freuhauf*, 365 U.S. 146, 157 (1961); *see also Valley Forge*, 454 U.S. at 486.

Flast's narrow exception to the prohibition against federal taxpayer standing in no way authorizes this multi-pronged attack on bedrock Article III principles. As this Court has

repeatedly emphasized, *Flast* does not grant standing to those seeking a "'fair and constitutional use of [a federal taxpayer's] dollar,'" in the Establishment Clause context or elsewhere. *Cuno*, 126 S. Ct. at 1862 (quoting *Valley Forge*, 454 U.S. at 476-82). *Flast* certainly does not provide taxpayers with an ongoing equity stake in federal coffers, which somehow authorizes them to pursue a derivative claim on behalf of the Treasury, contrary to the Treasury's own wishes. Nor does *Flast* suggest that a terminated "Controversy" between a taxpayer and the Government over allegedly unconstitutional expenditures of tax dollars may be revived solely in order to adjudicate whether the recipient of the federal aid should "return" the money.

The court's erroneous expansion of taxpayer standing further isolates the Seventh Circuit, which had previously extended *Flast* in *Freedom From Religion Foundation v. Chao*, 433 F.3d 989 (7th Cir. 2006), and squarely conflicts with the taxpayer standing and justiciability decisions of this Court and lower courts. The court's decision also imposes a severe disincentive on religiously-affiliated institutions from receiving public aid, for fear that they may be haled into court many years later to return the long-spent money, solely because a court determines that the public officials making the grant did not impose some unspecified level of "appropriation conditions" on it. Pet. App. 4a (order clarifying original opinion). This Court should grant certiorari to reaffirm the essential elements of a live "Case" or "Controversy" and the boundaries of taxpayer standing.

A. The Seventh Circuit's Decision Impermissibly Expands The Limits of Taxpayer Standing To Grant Taxpayers An Interest In The Federal Treasury.

Here, under black-letter mootness principles, there is no longer a live "Case" or "Controversy" between Plaintiffs and the alleged unconstitutional actor. All of the federal expenditures constituting the allegedly unconstitutional

religious sponsorship are gone and the five-year grant term has expired. Prospective relief therefore obviously would be improper and, as the court expressly conceded, there is no retroactive monetary remedy available against the Government. Pet. App. 5a. Accordingly, since there is no relief available against the constitutional wrongdoer, there is no live controversy between Plaintiffs and the Government concerning its prior spending. As *Doremus v. Board of Education of Borough of Hawthorne* stated in an Establishment Clause case, "no decision we could render now would protect any rights [plaintiff] may once have had and this Court does not sit to decide arguments after events have put them to rest." 342 U.S. 429, 433 (1952); *see Spencer*, 523 U.S. at 1-2 ("The parties must continue to have a personal stake in the outcome of the lawsuit.") (internal quotation marks and citation omitted); *Burke v. Barnes*, 479 U.S. 361, 363 (1987) ("Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case.") In *Burke*, for example, this Court dismissed as moot plaintiffs' constitutional challenge to the President's pocket veto because the vetoed bill had expired on its own terms during the appellate process, even though it was possible that the funds expended in violation of the bill might be recoverable. *Id.*; *see also Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414 (1972) (*per curiam*) (taxpayer's Establishment Clause challenge to tax-exemption for certain church property was mooted when the legislature repealed the relevant statute); *Bunting v. Mellen*, 541 U.S. 1019, 1020-21 (2004) (Stevens, J., opinion regarding denial of certiorari) (three-justice opinion acknowledging dispute over the constitutionality of a "supper prayer" was moot where the defendant had retired and thus suffered no direct injury from a decision invalidating the prayer he had sponsored).

The majority opinion sought to avoid these straightforward mootness principles by suggesting that the plaintiff could seek retroactive relief against *Notre Dame*, a

private actor incapable of committing the constitutional wrong, by enjoining it to *provide* money to the alleged constitutional wrongdoer. In so ruling, the court necessarily found that taxpayer plaintiffs have standing not only to enjoin an unconstitutional religious expenditure, but also to force private entities to give money to the Government, to "remedy" the Government's own Establishment Clause violation. For numerous reasons, it is impermissible to expand *Flast*'s limited authorization for taxpayers to seek "an injunction against the spending" of money in violation of the Establishment Clause into a doctrine which deputizes taxpayers retroactively to seek relief for the Government against third parties who could not violate the constitutional rights of Plaintiffs or anyone else. *Cuno*, 126 S. Ct. at 1865.

1. The "irreducible constitutional minimum of standing" requires "the plaintiff [to] have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized," and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). Constitutional standing also requires a plaintiff to establish traceability—"a casual connection between the injury and the conduct"—and redressability—that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-61 (internal quotation marks omitted). A plaintiff has no standing to assert "harm to his and every citizen's interest in proper application of the Constitution and laws, and [to] seek[] relief that no more directly and tangibly benefits him than it does the public at large." *Id.* at 573-74.

Taxpayers universally have been denied standing based on their financial interest in the federal Treasury to challenge an outlay of federal funds. A taxpayer's interest "in the moneys of the treasury—partly realized from taxation and partly from other sources—is shared with millions of others [and] is comparatively minute and indeterminable," and the effect of a challenged congressional expenditure on an individual

citizen's tax burden is too "remote, fluctuating and uncertain" to constitute a cognizable injury for standing purposes. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974) (rejecting taxpayer standing); *United States v. Richardson*, 418 U.S. 166 (1974) (same); *Ex parte Levitt*, 302 U.S. 633 (1937) (same). Any injury from the expenditure of tax dollars "is essentially a matter of public and not of individual concern." *Frothingham*, 262 U.S. at 487.

In *Flast v. Cohen*, 392 U.S. 83, 102 (1968), this Court allowed taxpayers standing to assert a religious injury caused by Congress's expenditure of tax dollars. "The *Flast* Court discerned in the history of the Establishment Clause 'the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general.'" *Cuno*, 126 S. Ct. at 1865 (quoting *Flast*, 392 U.S. at 103) (brackets in original). As such, the Court understood that taxpayers had standing to seek an injunction against specific congressional expenditures in violation of the Establishment Clause. "[A]n injunction against the spending would of course redress [the 'extract[ion] and spen[ding]' of 'tax money' in aid of religion], regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." *Id.* Under *Flast*, "a taxpayer will be a proper party to allege the unconstitutionality *only* of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Flast*, 392 U.S. at 102 (emphasis added). The Court has subsequently applied *Flast*'s "narrow exception" with "rigor" and has never found taxpayer standing outside the particular facts of *Flast*. *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988); *Valley Forge*, 454 U.S. at 481. The Court has never concluded in any context that an injury based on "the asserted effect of the allegedly illegal activity on public

revenues" provides taxpayers with standing. *Cuno*, 126 S. Ct. at 1862.

2. While Plaintiffs had standing to *prevent* the expenditure here from being used to sponsor religion, they had no standing to seek relief forcing Notre Dame to provide money to the Government. "'[S]tanding is not dispensed in gross,'" *Cuno*, 126 S. Ct. at 1868 (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)), so "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). As this Court recently held in *Cuno*, a plaintiff who, based on his or her status as a taxpayer, establishes an Article III injury and remedy cannot bootstrap an unrelated injury or remedy into their case. "'The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.'" 126 S. Ct. at 1868 (quoting *Lewis*, 518 U.S. at 357).

Here, Plaintiffs cannot establish standing to seek the relief invented for them by the court. First, they have suffered no injury related to, or redressable by, the "restitutionary" relief. As the court below conceded, any religious injury such as indoctrination "cannot be rectified." Pet. App. 5a. If a college to which Notre Dame provided funds used that money to conduct a prayer service, that publicly-sponsored prayer is in no way affected or undone if an amount equivalent to the grant disbursement is now transferred from Notre Dame to the federal Treasury. Rather, as the court also conceded, the only thing "fixed" by its "restitutionary" relief is the "depletion of the federal treasury by the amount of the grant." *Id.*

But Plaintiffs here have no Article III stake in the federal Treasury or in the purely financial issue of whether Notre Dame should rectify the Treasury's depletion. As noted above, the injury identified in *Flast* is the First Amendment *religious* injury caused by public sponsorship of religion. *Flast* does not provide some heightened interest in the

federal fisc in Establishment Clause cases, nor does *Flast* suggest that the taxpayer has some separate, individual interest in the Treasury that could support standing after that religious injury has passed. Consequently, taxpayers have no cognizable interest in, or standing to require, *returning* money to the federal Treasury. The Court has made this clear in a variety of contexts, including in Establishment Clause cases.

In *Valley Forge*, the United States gave away land worth at least $577,500 to a sectarian religious college. 454 U.S. at 468; *see also id.* at 512 n.19 (noting that "its fair market value was approximately $1.3 million") (Brennan, J., dissenting). While the return of this land would have rectified the "depletion of the federal treasury" and would have restored the Government to the *status quo ante*, the Court found that taxpayers had no standing to seek such relief under the Establishment Clause. In doing so, the Court expressly rejected the notion that, under *Flast*, "the standing of a taxpayer is established by his 'continuing stake . . . in the disposition of the Treasury to which he has contributed his taxes.'" *Id.* at 485 n.20 (quoting *post* at 497 (Brennan, J., dissenting)).

To be sure, the diminution of government resources in *Valley Forge* was caused by action taken under the Property Clause, rather than the Spending Clause. *Id.* at 480. But Plaintiffs' standing here to challenge *spending* under *Flast* ceased when the spending ceased. Consequently, like the plaintiffs in *Valley Forge*, they must now establish standing to seek *replenishment* of the Treasury to retroactively undo an Establishment Clause violation, by showing that they are injured if the Treasury is not replenished. *Valley Forge*, like all of the other taxpayer standing cases in the Establishment Clause context and elsewhere, establishes that there is no such standing because the failure to enhance federal coffers is not a sufficient Article III injury. Indeed, *Valley Forge* specifically noted that, "[e]ven if respondents had brought their claim within the outer limits of *Flast* . . . they still

would have encountered serious difficulty in establishing that they 'personally would benefit in a tangible way from the court's intervention.'" *Id.* at 480 n.17 (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)).

The Court has elsewhere plainly held that, even if a citizen plaintiff has standing to challenge an *ongoing violation*, he or she has no standing to challenge a prior violation if the only potential relief is money to the federal Treasury. In *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 106 (1998), the plaintiff had no standing to challenge past violations of the statute because the only relevant remedy benefited the federal Treasury, even though the private citizen had suffered sufficient "concrete injury in fact" to challenge ongoing violations of a law imposing environmental reporting requirements. *Id.* at 105; *see id.* at 121, 132. Once the violations terminated, the plaintiff had no standing because the monetary relief—civil penalties—could not be "viewed as a sort of compensation or redress" to the private plaintiff because the penalties were not "payable" to it, but to the "United States Treasury." *Id.* at 106. Since the money in the federal Treasury is the Government's, a private plaintiff has no personal stake in the controversy and, as *Steel Company* emphasized, "the requirements of a constitutional case or controversy . . . has always been the same: whether a plaintiff would personally benefit in a tangible way from the court's intervention." *Id.* at 104 n.5 (internal quotation marks omitted); *see also Diamond v. Charles*, 476 U.S. 54, 66-67 (1986). While a plaintiff might have a strong interest in insuring that "the United States Treasury is not cheated . . . or that the Nation's laws are faithfully enforced, that physic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co.*, 523 U.S. at 107; *see also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) ("[T]he Art. III judicial power exists only to redress or otherwise to protect against

injury *to the complaining party*.") (internal quotation marks omitted) (emphasis in original).

Second, "the interest of a taxpayer in the moneys of the federal treasury," even if cognizable, is plainly not *superior* to that of the Government, and therefore "furnishes no basis" for ordering a monetary transfer to the Treasury that it is not sought by the Government. *Cuno*, 126 S. Ct. at 1862 (internal quotation marks omitted). As this Court has emphasized, "Congress, not this Court or other federal courts, is the custodian of the national purse" and, under basic separation of powers principles, the judiciary should not override the political branches' decisions on how to best "secur[e] the treasury or the government against financial losses, . . . including requiring reimbursement for injuries . . ." *United States v. Standard Oil Co.*, 332 U.S. 301, 314-15 (1947). Decision-making concerning money coming into the Treasury "is the very epitome of a policy judgment committed to the 'broad and legitimate discretion' of lawmakers, which 'the courts cannot presume either to control or predict.'" *Cuno*, 126 S. Ct. at 1863 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)).

The court of appeals recognized, under separation of powers principles, that it could not enjoin the Secretary to recoup funds from Notre Dame. Pet. App. 6a-7a (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)). For the same reasons, the court should have concluded that it could not order Notre Dame to provide such funds to the Treasury over the Secretary's objection. The court itself acknowledged that the "change in the form of relief" from Plaintiffs' requested injunction against the Secretary to its novel restitution theory "has no practical significance"—indeed, both are equally invasive of the political branches' prerogatives over federal monies. Pet. App. 9a. Even if taxpayers were analogous to *qui tam* plaintiffs expressly authorized to sue *on behalf of* the Government, such plaintiffs could not bring a claim to

replenish the federal Treasury if the Government ordered otherwise. *See Vt. Agency of Natural Res.*, 529 U.S. at 771.

Third, any potential injury is not redressable because there is no potential relief against the constitutional wrongdoer. This Court repeatedly has set forth the seemingly self-evident proposition that a court cannot adjudicate a claim of illegality against state actors if no remedy can be entered against them, due to sovereign immunity or other reasons. *See, e.g.*, *Green v. Mansour*, 474 U.S. 64, 73 (1985) ("There is a dispute about the lawfulness of respondent's past actions, but the Eleventh Amendment would prohibit the award of money damages or restitution if that dispute were resolved in favor of petitioners."). For example, in the venerable decision of *Marye v. Parsons*, 114 U.S. 325 (1885), the Court dismissed a contract action against a State "because there is no remedy by suit to compel the state to pay its debts" and the suit therefore impermissibly "calls for a declaration of an abstract character," as federal courts do not "sit to determine questions of law *in thesi*." *Id.* at 328-30; *see also Steel Co.*, 523 U.S. at 104 n.5; *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."); *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (case moot where plaintiff was in the final quarter of law school and no decision would affect his graduation).

This Court similarly dismissed a claim against the United States in *Muskrat v. United States*, 219 U.S. 346 (1911). There, although the Government had been designated by statute as a proper defendant, it had no property interest in determining which private citizens should share the tribal lands in question: "the United States . . . has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part." *Id.* at 361. "[J]udgment could not be executed" against the United States, so there was no "case or

controvers[y] arising between opposing parties" which the Court could properly adjudicate. *Id.* at 362; *see Lord v. Veazie*, 49 U.S. 251, 255 (1850) ("[A]ny attempt . . . to obtain the opinion of the court . . . when there is no real or substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as punishable contempt of court.").

In short, this Court has never allowed a plaintiff to assert a claim against a State or any defendant where no remedy against the wrongdoer is possible. To do so would allow a plaintiff improperly to assert "an 'abstract disagreemen[t]' over the constitutionality of [government action]." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479 (1990) (citation omitted).

Fourth, the remedy against Notre Dame, far from being "routine," is unknown to Anglo-American jurisprudence, in either law or equity. Pet. App. 7a. As the court itself noted, "[w]hen a plaintiff seeks monetary relief, he is seeking payment by the defendant to himself, *not to another*," so the Plaintiffs' "restitution" for the Government here is "*not* . . . monetary relief, in the usual sense." *Id.* 8a (emphasis added). While it is possible for a plaintiff to secure restitution from an innocent party if the wrongdoer has transferred money to it, *see id.* 7a, nothing in law or equity allows the plaintiff to seek recovery *for* the wrongdoer.

Undoubtedly the reason that the court's novel "restitution" relief has never before been entered by a federal court is because it destroys any "adverseness" between the plaintiff "victim" and the wrongdoing defendant. Here, the Government has every financial incentive to acquiesce, expressly or otherwise, in a liability determination in order to enrich itself. An action against such a defendant thus cannot satisfy even the necessary, albeit insufficient, threshold standing requirement—"clear concreteness provided when a question emerges precisely framed and necessary for

decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests." *Freuhauf*, 365 U.S. at 157; *see also Valley Forge*, 454 U.S. at 486 (discussing "concrete adverseness"); *Lewis*, 518 U.S. at 353 n.3.

The court of appeals further exacerbated the lack of concrete adversity by imposing its own restitutionary remedy against a third party, where Plaintiffs had never requested the relief nor asserted any relief against that third party. Article III requires litigants to press a present "Case" or "Controversy" and requires judges to decide those cases as presented. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68-69 (1997) (case moot where relief was unavailable under claims asserted in complaint). There is a "long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' but rather must affirmatively appear in the record,'" and that "it is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *Spencer*, 523 U.S. at 10-11 (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)) (internal quotation marks omitted). Article III does not allow an inventive appellate court to create a dispute by imposing its own remedy, particularly, as here, where the court's remedy has never been granted in any court. *See, e.g.*, *Harris v. City of Houston*, 151 F.3d 186, 191 (5th Cir. 1998) ("On appeal, [plaintiffs] suggest that we 'read into' their complaint additional requests for relief and then . . . proceed in such a fashion. The 'case and controversy' requirement of Article III is no mere formality—a nuisance to be brushed away before setting down to the business of constitutional interpretation."). This is even more obviously true here because, as explained below, the remedy invented by the court significantly alters the dispositive liability question from whether the Government violated the First Amendment to whether the recipient institution can be equitably deemed

to have reasonably relied on the statutory grant. *See* pp. 23-24, *infra*.

3. Thus, every criteria that this Court has identified for assessing standing—personal injury, redressability, adverseness and properly limiting the judicial role in a tripartite system—counsel strongly against granting taxpayer standing to seek replenishment of the federal Treasury. The court below nonetheless seemed to believe that taxpayers had standing to seek such a remedy because the "tortured opinions" in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976) (plurality op.), *Lemon v. Kurtzman*, 411 U.S. 192 (1973) ("*Lemon II*"), and *New York v. Cathedral Academy*, 434 U.S. 125 (1977), purportedly established that "there is no *per se* rule that the recipient of the legal funds who have spent them cannot be forced to repay them." Pet. App. 10a.

Those opinions' discussion of remedies sheds no light on the antecedent justiciability question of whether taxpayer plaintiffs have standing to force reimbursement. The Court has repeatedly cautioned that opinions which *assume* such jurisdictional prerequisites do not in any way suggest that those requirements have been satisfied. *Steel Co.*, 523 U.S. at 91 (holding "drive-by jurisdictional rulings . . . have no precedential effect"). Moreover, as the dissenting opinion noted, *Cathedral Academy* and *Lemon II* could not have even *presented* the question whether taxpayers have standing to enjoin reimbursement to the public Treasury because the only issue in those cases was whether it was proper to enjoin future payments *by* the State. Pet. App. 24a. Nor did *Cathedral Academy* even involve taxpayer plaintiffs; it involved a declaratory judgment action brought by a religious school seeking reimbursement for expenses involved in state-mandated testing services. 434 U.S. at 125.

A three-justice plurality in *Roemer* did briefly discuss the issue, noting and *rejecting* the taxpayers' request for reimbursement for prior payments made under a *concededly*

unconstitutional program. 426 U.S. at 767 n.23. The plurality never examined the issue of standing, nor did it imply that providing repayment would somehow cure the substantive violation that allegedly had already occurred or would otherwise prevent a case from being moot. The plurality did conclude, however, that requiring private institutions to repay government funds spent on religious activities would actually undermine Establishment Clause principles: "As for the protection of substantive constitutional rights, the separation of church and state may well be better served by not putting the State of Maryland in the position of a judgment creditor of the appellee colleges." *Id.* Thus, far from supporting the proposition that an Establishment Clause violation could be cured by the recoupment of funds from private recipients, the three justices in *Roemer* concluded that such a remedy would intensify the constitutional dilemma.[6]

Moreover, the appellate court's adoption of a "reasonable reliance" test, as purportedly set forth in *Roemer* and *Lemon II*, further demonstrates how far afield the court's remedy is from the merits of the Establishment Clause claim. The

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[6] The other justification offered by the opinion below was that advisory opinions are necessary to prevent Congress from transferring millions of dollars for expressly religious purposes within two days of enactment, thus purportedly evading judicial review. Pet. App. 6a. But, even if the court of appeals' far-fetched hypothetical did come about, any such lightning quick congressional grant likely would fall within the exception to mootness for government actions capable of repetition yet evading review. *See Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976). There is no need to badly mangle fundamental elements of taxpayer standing and mootness to resolve a hypothetical that will not occur and already has a ready-made constitutional solution. Indeed, there never has been such a case in the real world, and there never will be given the actual pace at which congressional appropriations are distributed and spent. In all events, this hypothetical does not have any application to this case as the five-year grant provided Plaintiffs ample time to litigate their action.

court below emphasized that the question on remand is not whether the Government's grant violated the Establishment Clause, but whether the "religious institution reasonably relied, to its detriment, on the grant's being legal." Pet. App. 10a; *see also id.* 1a. This reasonable reliance inquiry turns on a "totality of circumstances" analysis which focuses on whether (1) the grant's unconstitutionality "could be predicted with assurance" in an area where the Court itself "can only dimly perceive the lines of demarcation"; (2) the "general principle that [federal] officials and those with whom they deal are entitled to rely on a presumptively valid . . . statute"; (3) whether the "suit had been filed prior to the time the reliance occurred"; (4) whether the "funds in question . . . have been . . . spent by the colleges" and all the other "practical realities and necessities inescapably involved in reconciling competing interests." *Lemon II*, 411 U.S. at 201, 205, 208 (internal quotation marks omitted); *Roemer*, 426 U.S. at 767 n.23. Consequently, on remand, the constitutionality of the grant itself will be only one subsidiary factor in resolving the dispositive question of the reasonableness of Notre Dame's activity. Indeed, the public aid in *Roemer* was concededly unconstitutional and the aid in *Lemon II* had been found by this Court to be unconstitutional, but the Court found "reasonable reliance" in both cases.

Because the issue of reasonable reliance is dispositive, the court likely will never even reach the merits of Plaintiffs' claims. The most plausible outcome on remand is that Notre Dame will be found to have reasonably relied because it was entitled to assume the constitutionality of a congressional enactment and there is certainly no clear precedent suggesting that *neutral* aid to a higher education institution is unconstitutional. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality op.); *id.* at 838, 840 (O'Connor, J., concurring in the judgment); *Agostini v. Felton*, 521 U.S. 203, 231 (1997). Accordingly, at the end of the long journey required by the court below, plaintiffs will not even have the

"psychic satisfaction" of a ruling that the grant is unconstitutional and, even if that issue is resolved in passing, it will not be in a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472.

4. In addition to conflicting with this Court's precedent as described above, the decision below is also at odds with the uniform decisions of the other circuit courts. Every circuit that has addressed the issue has held that exposure to past religious indoctrination is insufficient to establish a present case or controversy. *See, e.g.*, *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (*en banc*) (case was mooted because "the student-plaintiff already has suffered any injury that would result from the alleged forced participation in prayers that were part of the student-plaintiff's graduation ceremony" and plaintiff had not sought monetary damages); *see also Chaudhuri v. Tennessee*, 130 F.3d 232, 235 (6th Cir. 1997) (claims for injunctive and declaratory relief appeared moot when university changed its policy to include moments of silence rather than prayers); *Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1477-78 (11th Cir. 1997) (declaratory and injunctive claims alleging Establishment Clause violations were moot because student-plaintiffs had graduated). Although these cases did not deal with the expiration of a statute, the reasoning is applicable: if a past Establishment Clause violation may be "cured" by dispelling any state endorsement after the fact—either by forcing private actors to repay the State or by the State repudiating the apparent religious content—these cases could not have been moot.

The Seventh Circuit's opinion also exacerbates a direct circuit split regarding whether a valid "Case" or "Controversy" exists when a court imposes a remedy under Federal Rule of Civil Procedure 54(c) never requested by the Plaintiff to resurrect a moot case. As then-Judge Roberts wrote, "the possible availability of [relief under Rule 54(c)] would not establish standing or defeat mootness objections."

Hedgepeth v. Wash. Metro. Area Transit Auth., 386 F.3d 1148, 1152 n.2 (D.C. Cir. 2004); *see also NAACP v. United States Sugar Corp.*, 84 F.3d 1432, 1438 (D.C. Cir. 1996) ("Rule 54(c) comes into play only after the court determines it has jurisdiction.") (internal quotation marks omitted). In addition to the D.C. Circuit, the court's decision conflicts with the First, Second, and Fifth Circuits. *See, e.g.*, *Fox v. Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 142 (2d Cir. 1994) (eleventh-hour claim for nominal damages, even though available, could not "breathe life into a moribund dispute") (internal quotation marks omitted); *Harris*, 151 F.3d at 191 (refusing to "read into" the complaint relief not specifically requested); *Thomas R.W. v. Mass. Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997) (same). Only the Ninth Circuit, over a strenuous dissent by Judge Kozinski, has adopted a similar interpretation as the Seventh Circuit. *See, e.g.*, *Z Channel Ltd. P'ship v. Home Box Office, Inc.*, 931 F.2d 1338, 1341 (9th Cir. 1991) (holding plaintiff's claims for declaratory and injunctive relief moot, but holding that Rule 54(c) "allows the district court to award damages if [the plaintiff] proves facts entitling it to relief even though [plaintiff] never requested damages"). Simply put: a court cannot *sua sponte* create a dispute between parties that previously had not existed.

B. The Questions Presented Are Of Fundamental Importance And Warrant Immediate Review.

The interrelated questions presented on taxpayer standing and mootness are of fundamental importance, which warrant this Court's immediate review. *See, e.g.*, *Valley Forge*, 454 U.S. at 470 (granting certiorari "[b]ecause of the unusually broad and novel view of standing to litigate a substantive question"). The court of appeals' decision will have a chilling effect on private charities and institutions who accept or have accepted federal dollars. These entities now face the unprecedented risk of litigation and the possibility of future repayment of dollars spent long ago. Under the court's logic, if the Cleveland voucher program assisting

religious schools terminated of its own accord after five years, taxpayers could have brought a suit *after* that termination to seek to force parents to return the allegedly unconstitutionally payments to the municipal treasury. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). And since the "injury" is the failure to *replenish* the Treasury for improper expenditures, that injury is ongoing and such a "restitutionary" suit could be brought at any time. Taxpayers today, for example, could sue the thousands of publishers who received a tax exemption for religious publications held unconstitutional in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). The threat of such challenges is inexplicable and would constitute an unwarranted sea change in constitutional litigation.

More importantly, in granting taxpayers an interest in the federal Treasury superior to the Government and authorizing suits against private plaintiffs for expenditures long ceased, the court of appeals has loosed *Flast* from its constitutional moorings of enjoining impermissible religious sponsorship and has overturned basic justiciability requirements. Standing and mootness, far from technical requirements, are critical structural protections against judicial encroachment on legislative and executive authority. Federal courts "have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional." *Frothingham*, 262 U.S. at 488. Determining the constitutionality of a federal statute in the absence of an Article III "Case" or "Controversy" is not to "decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority [the courts] plainly do not possess." *Id.* at 489.

Taxpayer standing has already become dangerously loose in the Seventh Circuit and, if not checked, will become the universal destination for filing taxpayer actions. *See* Brief of Petitioner, *Grace v. Freedom from Religion Foundation, Inc.*, No. 06-157 (filed Aug. 1, 2006) (Solicitor General's Petition noting that Seventh Circuit threatens to become a

"universal forum for Establishment Clause challenges . . . . [as] anyone nursing a generalized grievance against the federal executive is likely to be able to locate a like-minded taxpayer residing in the Seventh Circuit."). Specifically in *Freedom from Religion Foundation v. Chao*, 433 F.3d 989 [pending as *Grace v. Freedom from Religion Foundation*, No. 06-157], the Seventh Circuit held that federal taxpayers could challenge the actions of Executive Branch officials acting pursuant to an Executive Order on Establishment Clause grounds. There, no funds were distributed to non-governmental entities or individuals and the actions were financed only indirectly through general appropriations. *Id.* at 994. As Judge Ripple noted in his dissent, this novel interpretation of standing "makes virtually any executive action subject to taxpayer suit" as "[t]he executive can do nothing without general appropriations from Congress." *Id.* at 1000. When combined with the court's decision here, granting taxpayer's standing to recover previously spent government funds, the court has given taxpayers unlimited authority over the public fisc if an Establishment Clause violation is alleged. Presumably, even if Executive officials ceased and disavowed the actions at issue in *Freedom from Religion*, taxpayers now could seek recoupment of the officials' salaries and benefits to keep the case alive.

The Seventh Circuit is far outside the boundaries of this Court's decisions and the decisions of its sister circuits. Granting certiorari in both this matter and *Freedom from Religion* would provide the Court the unique opportunity to examine taxpayer standing in a comprehensive manner and bring clarity to an issue that is "recurring and difficult." 447 F.3d at 989 (Easterbrook, J., concurring in the denial of rehearing en banc). As Judge Easterbrook specifically noted in his concurrence in denying rehearing on *Freedom from Religion*, both this case and *Freedom from Religion* warrant further review by this Court, as "[o]nly the rule's proprietors can bring harmony—whether by extension or

contradiction—or decide to tolerate the existing state of affairs." *Id.* at 989, 990.

At a minimum, certiorari should be granted here, given the breadth of the court of appeals' decision, and the wide effect this decision will have on the Court's settled justiciability precedent. *Freedom from Religion* deals with the permissibility of an executive action without a direct expenditure by Congress. While this is an important issue, it will have limited practical effect (and its resolution will provide no direct guidance on the issue presented here). This case, in contrast, involves the broader, core analytical question presented by taxpayer standing: what stake a federal taxpayer has in the federal Treasury. The court's holding, which rests on a taxpayer's financial interest, is directly contrary to *Frothingham*, *Doremus*, and *Flast*, improperly injects the judiciary into fiscal matters committed to coordinate branches, and improperly and unfairly imposes the unprecedented risk of repayment of previously spent government funds on thousands of private charitable organizations. Indeed, based largely on this case, a district court in a taxpayer suit has already ordered a religious organization to repay the State of Iowa $1.5 million that the organization received in return for providing programs in prisons. *See, e.g.*, *Ams. United for Separation of Church & State v. Prison*, 432 F. Supp. 2d 862 (S.D. Iowa 2006).

Only by granting certiorari in this case can the Court answer these difficult questions and have the opportunity to clarify the nature and scope of the taxpayer's interest in an Establishment Clause case. Notre Dame, in addition, has sought review regarding the continuing validity of *Flast*, a question not presented by *Freedom from Religion*. This case, accordingly, provides a better vehicle for the Court to provide comprehensive clarity to the doctrine of taxpayer standing and the only vehicle for the Court to address the fundamental issues plaguing taxpayer standing.

C. *Flast v. Cohen* No Longer Has A Valid Constitutional Mooring And Should Be Overruled If It Can Co-Exist With The Court of Appeals' Decision.

If the court of appeals' decision is consistent with *Flast*, then *Flast* is not grounded on sound constitutional moorings and should be overruled.

Flast already stands on an island in providing federal taxpayers standing to enjoin congressional expenditures that allegedly violate the Establishment Clause. No other constitutional provision has warranted such treatment. In granting this preferred status, the opinion appears to have loosened the "injury-in-fact" requirement, emphasized in the Court's more recent standing cases. And, as commentators have suggested, it conflated the merits of the action with the question of standing. *See, e.g.*, CHARLES ALAN WRIGHT, ET AL., FED. PRAC. & PROC. § 3531.10, at 648 (2006 update) ("Only a theory that some constitutional rights deserve greater judicial solicitude than others can account for the *Flast* ruling that unconstitutional spending is an injury sufficient to confer standing with respect to some constitutional trespasses but not others."). As noted by Judge Easterbrook in his concurrence in the denial of rehearing en banc in *Freedom from Religion*, the tension between *Flast* and the Court's subsequent decisions appears "arbitrary" and "illogical." 447 F.3d at 989; *see also* JAMES WM. MOORE, ET AL., MOORE'S FED. PRAC. § 101.60 (3d ed. 1999) (arguing *Flast* is a "constitutional *non sequitur*").

Moreover, a rule that provides taxpayers a *financial* interest in the federal Treasury in Establishment Clause cases, but not in others, would be particularly illogical and arbitrary. *See Valley Forge*, 454 U.S. at 485 n.20. Only by firmly securing taxpayer standing to this religious injury can the Court's precedent rest on stable ground. Any other rule would eliminate *Flast*'s crucial distinction, and the decisions

set down by this Court in *Valley Forge*, *Cuno*, *Schlesinger*, and *Richardson* could no longer properly distinguish *Flast*.

The Seventh Circuit's interpretation of *Flast* as a financial interest leads to irreconcible results. As Judge Easterbrook pointed out, "[t]hat no court is willing (yet!) to entertain a suit about a speech that costs $50,000 to draft, deliver, and distribute through the Government Printing Office—while adjudicating objections to $500,000 grants that do not cost the plaintiff even 1¢—suggests problems in *Flast*'s underpinning and application." *Freedom from Religion*, 447 F.3d at 990. No logical justification can provide taxpayers standing to seek the financial recovery of funds spent in excess of Congress's power under the Establishment Clause, where there is no taxpayer financial interest in recovering funds spent in excess of other constitutional limitations on the Government's power. *Cf. Cuno*, 126 S. Ct. at 1855-56. Equally illogical, if the taxpayers' interest is financial, would be the requirement that only prior expenditures under the Spending Clause can support standing, as opposed to prior improper distributions of federal assets under the Property Clause. *Cf. Valley Forge*, 454 U.S. at 464-65. If the Court cannot provide a constitutionally justifiable basis for maintaining the doctrine, it should be abandoned and *Flast* overruled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

United States Court of Appeals, Seventh Circuit.

Joan LASKOWSKI and Daniel M. Cook,
Plaintiffs-Appellants,

v.

Margaret SPELLINGS, in her official capacity as Secretary of the United States Department of Education,
Defendant-Appellee,

and University of Notre Dame,
Defendant-Intervenor-Appellee.

No. 05-2749.

July 26, 2006.

Before POSNER, EVANS, and SYKES, Circuit Judges.

POSNER, Circuit Judge.

In our original opinion, 443 F.3d 930 (7th Cir. 2006), issued on April 13 of this year, we held, among other things, that if a grant by the Secretary of Education to the University of Notre Dame had violated the First Amendment's establishment clause, the plaintiffs in this taxpayers' suit might be able to obtain from the district court an order of restitution directing the university to return the money in question to the U.S. Treasury, even if the university had redistributed the money to other colleges rather than spending it itself. The qualification in "might" was in recognition that "there are defenses to restitution. The recipient of the money sought to be recovered may not have known or have had reason to know that it was receiving money by mistake, and may have relied to its detriment on its honest and reasonable belief that it was legally entitled to the money. Notre Dame did rely to its detriment—it gave the money away. Whether it relied reasonably is a separate question. If it was merely an innocent conduit, neither knowing nor having reason to know that it was receiving an unlawful grant, it would not have to make restitution," *id.* at 936—the "separate question" we left open for determination on remand.

In response to the petitions for rehearing we wish to clarify two points, both relating to section 309 of the Consolidated Appropriations Act, 2000, Pub.L. 106-113, 113 Stat. 1501A-261 to 262 (Nov. 29, 1999)—the provision that earmarked the funds for Notre Dame that are at issue in this suit. The provision states (so far as bears on this case) that "of the funds provided in title III of this Act, under the heading 'Higher Education,' for title VII, part B of the Higher Education Act of 1965 ... $500,000 [is earmarked] for the University of Notre Dame for a teacher quality initiative."

1. This language, read in isolation, entitled Notre Dame to retain the entire grant rather than requiring it to redistribute the money to other colleges; the decision to do that was its own. But in the grant application that Notre Dame had been required to submit in order to obtain the grant from the Department of Education, Notre Dame had proposed that the grant be used for a "replication" program that would result in the redistribution of most—but not all—of the funds to other colleges for their "teacher quality initiatives." "Most" is not "all," so it is clear that Notre Dame was not required to act merely as a fiscal intermediary between the Treasury and the colleges that were the ultimate recipients of the money.

Although even a fiscal intermediary that receives money that it knows or should know was wrongfully obtained by the transferor, or wrongfully transferred to itself, can be made to pay restitution even if it has passed the money along to another entity, pursuant to its duty as an intermediary, *e.g.*, *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 155, 9 L.Ed. 373 (1836); *French Bank of California v. First National Bank*, 585 S.W.2d 431, 432 (Ky.App.1979); Dan B. Dobbs, 1 *Dobbs Law of Remedies* § 4.6 (2d ed. 1993), we emphasize the qualification "that it knows or should know was wrongfully obtained," lest we be thought to be trying to enlarge the liabilities of a fiscal intermediary. An agent may be made to pay restitution "not only where he indulged in wrongdoing for his own purposes, but also where he acted simply on his principal's behalf. If, however, he has been merely a conduit pipe for the payment of the money to the principal, he

can plead the defence [of change of position] even though the money has been obtained as a result of wrongdoing, provided that the agent neither participated in the wrongdoing nor knew about it." Lord Goff & Gareth Jones, *The Law of Restitution* § 40-018 (6th ed. 2002).

A fiscal intermediary has no personal claim to the funds it handles but holds them only for distribution without compensation. Notre Dame was not a fiscal intermediary. It was entitled to retain some of the grant for itself and anyway it is not a bank or other institution engaged primarily or routinely in financial intermediation. But like such an intermediary, Notre Dame can defend against a claim for restitution, as the quotation from our original opinion should make clear, on the ground of reasonable reliance. That defense remains open to it in the proceedings on remand that we have ordered.

2. The language of section 309 might seem to undermine the plaintiffs' constitutional claim—for how could a "teacher quality initiative" be unconstitutional? But the claim is not that Congress may not give money to religious institutions. It just may not give it without imposing conditions that prevent the use of the money for religious rather than secular purposes. 443 F.3d at 937. "[S]tates may not make unrestricted cash payments directly to religious institutions." *Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606, 612 (7th Cir. 2001), and cases cited there. Whether appropriate conditions were imposed by the Secretary of Education and were properly observed or implemented by Notre Dame are the issues on the merits that the district court will be resolving in the first instance on remand.

The petitions for rehearing are denied.

United States Court of Appeals, Seventh Circuit.

Joan LASKOWSKI and Daniel M. Cook,
Plaintiffs-Appellants,

v.

Margaret SPELLINGS, Secretary of Education,
Defendant-Appellee,

and University of Notre Dame,
Intervenor-Defendant/Appellee.

No. 05-2749.

Argued Jan. 9, 2006
Decided April 13, 2006

Before POSNER, EVANS, and SYKES, Circuit Judges.

POSNER, Circuit Judge.

This is a taxpayer suit, originally to enjoin a grant by the Secretary of Education of money to the University of Notre Dame to be used for a program called Alliance for Catholic Education (ACE). A congressional appropriation for fiscal year 2000 had earmarked $500,000 to be given Notre Dame for redistribution to several other religious colleges in order to enable them to replicate the ACE program on their own campuses. Consolidated Appropriations Act, 2000, 113 Stat. 1501, 1501A-262 (Nov. 29, 1999). The complaint alleges that the grant violated the First Amendment's prohibition against Congress's creating religious establishments, a prohibition that the Supreme Court has interpreted to encompass any direct financial support by the government of religious activities. Notre Dame was permitted to intervene in the case in the district court as a defendant.

ACE is a program for training teachers in Catholic schools. It has three parts—professional development, community life, and spiritual growth. The first part consists of both teacher-training courses and field experience teaching at Catholic elementary and secondary schools. The second consists of the teachers' residing in faith-based communities while doing apprentice teaching in

those schools. The third is encouragement of the teachers to live and work in accordance with the tenets of the Catholic faith. Thus, the program has both secular and religious components.

The district court dismissed the suit as moot because Notre Dame had received and spent the grant, a one-time grant in an appropriations bill. It was too late to enjoin the expenditure and the likelihood of a future such earmark was too remote to warrant injunctive relief. *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414-15, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972) (per curiam); see also *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478, 481-82, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990); *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929-30 (7th Cir. 2003).

We agree that the claim for injunctive relief is moot, but not that the entire case is. If $500,000 in federal money was expended by the Secretary of Education (actually slightly less, for reasons unnecessary to explain) in violation of the establishment clause, that expenditure was, in the contemplation of the law, an injury to objecting federal taxpayers. *Freedom from Religion Foundation, Inc. v. Chao*, 433 F.3d 989, 991-92 (7th Cir. 2006), and cases cited there. As explained in our opinion in that case, ordinarily federal taxpayers do not have standing to complain about federal expenditures, but the Supreme Court has carved an exception for cases in which a taxpayer complains that Congress is spending money in violation of the First Amendment's establishment clause. That expenditure is deemed sufficient injury to the taxpayer to allow him to maintain suit in federal court. And so the plaintiffs' case would be moot only if the district court could make no order that would compensate them in whole or in part for the injury consisting of the improper expenditure. We say in whole or "in part" because at argument Notre Dame's lawyer pointed out that insofar as the money has been spent for forbidden purposes, say to indoctrinate teachers or students in Catholic dogma, that injury cannot be rectified. What can be rectified, however, is the depletion of the federal treasury by the amount of the grant. It

can be rectified simply by the restoration of the money to the U.S. Treasury. That is "meaningful relief," as assumed in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 767 n. 23, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) (plurality opinion), which is all the relief that need be possible to avert a finding of mootness. *Church of Scientology v. United States*, 506 U.S. 9, 12-13, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992); *Calderon v. Moore*, 518 U.S. 149, 150, 116 S.Ct. 2066, 135 L.Ed.2d 453 (1996) (per curiam); *In re Resource Technology Corp.*, 430 F.3d 884, 886-87 (7th Cir. 2005); *In re Envirodyne Industries, Inc.*, 29 F.3d 301, 303-04 (7th Cir. 1994).

If Congress created a continuing program of expenditures challenged as violating the establishment clause—a program, say that consisted of annual $1 million grants to the Scottish Episcopal Church to pay the salaries of its ministers—it could be enjoined and in that way injury averted. But suppose Congress by an amendment to an appropriation bill earmarked $100 million for the Scottish Episcopal Church and the money was disbursed by the Department of the Treasury the following day. An injunction against the disbursement would come too late to provide any relief to the complaining taxpayers. The only feasible relief would be monetary. We cannot think of any reason why such relief should not be possible. Restitution is a standard remedy and one ordered in public-law as well as private-law cases. *See, e.g., Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 203-05, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967); *United States v. P/B STCO 213*, 756 F.2d 364, 374 (5th Cir. 1985).

This point has been obscured by a debate among the parties over whether the Secretary of Education can be made to order Notre Dame to restore the money to the Treasury. The Secretary is authorized to seek repayment of a grant diverted to sectarian purposes in violation of the Constitution and a Department of Education regulation. 34 C.F.R. § 75.532; *see* 31 U.S.C. §§ 3701(b)(1)(C), 3711(a)(1); 34 C.F.R. § 74.73(a). But courts are not authorized to review a decision not to take an enforcement action; such decisions are within the absolute

discretion of the enforcement agency. *Heckler v. Chaney*, 470 U.S. 821, 831-33, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985); *see also City of Chicago v. Morales*, 527 U.S. 41, 62 n. 32, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). Otherwise courts would take over the prosecutorial function, making decisions, well outside judicial competence, about the best allocation of limited enforcement resources.

The suggested procedure of ordering the Secretary to order Notre Dame to repay the grant money is not only unauthorized but also needlessly complex. If the plaintiffs prevail on the merits, the district court can simply order Notre Dame to return the money to the treasury. Notre Dame objects that as a private entity it is incapable of violating the establishment clause, which like most provisions of the Constitution is a limitation on the power of government, not of private entities. But if as the plaintiffs claim the Department of Education wrongfully took their tax money and gave it to Notre Dame, the court can order Notre Dame to return the money to the U.S. Treasury. It would be like a case of money received by mistake and ordered to be returned to the rightful owner. Such orders are routine instances of restitution. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213-14, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002); *ConFold Pacific, Inc. v. Polaris Industries, Inc.*, 433 F.3d 952, 957-58 (7th Cir. 2006); *Moriarty v. Larry G. Lewis Funeral Directors Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998); *Landmark Land Co., Inc. v. FDIC*, 256 F.3d 1365, 1378 n. 5 (Fed. Cir. 2001); Douglas Laycock, "The Scope and Significance of Restitution," 67 *Tex. L.Rev.* 1277, 1284 (1989) (a "defendant may be unjustly enriched without having committed any other civil wrong"). And restitution is among the remedies that a federal court can order for a violation of federal law. *See*, besides the cases cited earlier, *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290-91, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946); *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 225 (3d Cir. 2005); *see generally Franklin v.*

Gwinnett County Public Schools, 503 U.S. 60, 68, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992).

Against all this it can be argued that the plaintiffs have forfeited any claim to restitution by asking only for injunctive relief. But the argument is incorrect on three grounds. First, the plaintiffs made clear in the district court that they want the money that was given to Notre Dame and by it funneled to the other Catholic schools returned to the U.S. Treasury. They want the funnel to be an order to the Secretary of Education, but that is merely a detail. Second, Rule 54(c) of the civil rules provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65-66, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978); *Old Republic Ins. Co. v. Employers Reinsurance Corp.*, 144 F.3d 1077, 1081-82 (7th Cir. 1998); *Felce v. Fiedler*, 974 F.2d 1484, 1501-02 (7th Cir. 1992); *Powell v. National Board of Medical Examiners*, 364 F.3d 79, 85-86 (2d Cir. 2004); *Z Channel Ltd. Partnership v. Home Box Office, Inc.*, 931 F.2d 1338, 1340-41 (9th Cir. 1991) ("if Z Channel is entitled to collect damages in the event that it succeeds on the merits, the case does not become moot even though declaratory and injunctive relief are no longer of any use"); 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2664 (3d ed. 1998). The reason for this sensible rule is that in the course of a litigation circumstances may change and what initially seemed adequate relief may cease to be so. See *Minyard Enterprises, Inc. v. Southeastern Chemical & Solvent Co.*, 184 F.3d 373, 385-86 (4th Cir. 1999); *Z Channel Ltd. Partnership v. Home Box Office, Inc., supra*, 931 F.2d at 1340-41. But third, the plaintiffs are not actually seeking monetary relief, in the usual sense, against Notre Dame. When a plaintiff seeks monetary relief, he is seeking payment by the defendant to himself, not to another. These plaintiffs are asking that the district court order Notre Dame to repay the U.S. Treasury. Originally they wanted the district court to order the Secretary of Education to order Notre Dame to repay the U.S.

Treasury. Now they are cutting out the middleman. The change in the form of relief sought has no practical significance.

A genuine curiosity is that Notre Dame became a party on its own motion rather than having been named as a defendant by the plaintiffs; and it might seem that to seek restitution from someone other than the alleged wrongdoer does not fit within the scope of Rule 54(c). But remember that the plaintiffs' theory of the case first propounded in the district court was that Notre Dame would have to pay back the grant that it had received, though upon an order issued by the Secretary of Education. Once Notre Dame entered the case to preserve its right to the grant money, the natural remedy, to avoid needless circuity, was an order against it rather than against the Secretary to order Notre Dame to repay the money. For the application of Rule 54(c) in such a context, *see Pension Benefit Guaranty Corp. v. East Dayton Tool & Die Co.*, 14 F.3d 1122, 1127-28 (6th Cir. 1994).

There are defenses to restitution. The recipient of the money sought to be recovered may not have known or have had reason to know that it was receiving money by mistake, and may have relied to its detriment on its honest and reasonable belief that it was legally entitled to the money. Notre Dame did rely to its detriment—it gave the money away. Whether it relied reasonably is a separate question. If it was merely an innocent conduit, neither knowing nor having reason to know that it was receiving an unlawful grant, it would not have to make restitution. *Fidelity National Title Ins. Co. v. Howard Savings Bank*, 436 F.3d 836, 840 (7th Cir. 2006); 1 Dan B. Dobbs, *Law of Remedies: Damages-Equity-Restitution* § 4.6, pp. 656-58 (2d ed. 1993); *see, e.g., Westamerica Securities, Inc. v. Cornelius*, 214 Kan. 301, 520 P.2d 1262, 1269-70 (1974); *Anita Valley, Inc. v. Bingley*, 279 N.W.2d 37, 40-41 (Iowa 1979). But that remains to be determined.

In denying that the district court can ever order restitution in a case such as this, Notre Dame overreads two decisions in which the Supreme Court denied restitution as a remedy for a violation of the establishment clause: *Roemer v. Board of Public Works,*

supra, and *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973) ("*Lemon II*," as it is known). The ground in both cases was that the religious institution had reasonably relied, to its detriment, on the grant's being legal. Reasonable reliance, as we just noted, is a recognized defense to a suit for restitution against someone who is not himself a wrongdoer and who innocently received and spent money to which it turned out he had no right. *Fidelity National Title Ins. Co. v. Intercounty National Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005); *Harnischfeger Corp. v. Harbor Ins. Co.*, 927 F.2d 974, 978 (7th Cir. 1991); *Equilease Corp. v. Hentz*, 634 F.2d 850, 853-54 (5th Cir. 1981).

But as is plain from the rather tortured opinions (neither of which commanded a majority) in *Roemer* and especially *Lemon II*, and as is even plainer from the opinion in *New York v. Cathedral Academy*, 434 U.S. 125, 130, 133-34, 98 S.Ct. 340, 54 L.Ed.2d 346 (1977), which rejected a reliance defense in another establishment clause case, there is no per se rule that the recipient of illegal funds who has spent them cannot be forced to repay them, either in establishment clause cases or in any other class of cases. *See, e.g., Messersmith v. G.T. Murray & Co.*, 667 P.2d 655, 657-58 (Wyo. 1983); *Equilease Corp. v. Hentz, supra*, 634 F.2d at 854. In any event, the defense of reasonable reliance is not a jurisdictional doctrine, but rather a remedial doctrine that comes into play after liability has been established; and in this case the district court, having dismissed the suit as moot, never reached the merits.

The plaintiffs ask us to do so. They say there's sufficient documentation in the record to prove that the grant to Notre Dame has been used to fund religious activities. They emphasize the home pages of the four religious colleges to which Notre Dame disbursed the "replication" grant; the pages describe a program having a strong sectarian component. The defendants respond that those pages are hearsay, since the recipients are not parties (if they were, their home pages would not be hearsay, but party admissions). It is a curious argument for several reasons, the most obvious of which is that Notre Dame concedes as it

must that the ACE program, its own and its replicators', has a substantial religious component. Moreover, Notre Dame cited the home pages, and therefore presumably vouched for their accuracy, in its reports to the Department of Education on its use of the grant. Even now Notre Dame does not contest the accuracy of the home pages; this makes its objection to their admissibility hollow.

But though admissible, the home pages cannot carry the day for the plaintiffs. All they show is that these institutions, like Notre Dame itself, indeed have an ACE program, and that, as the name implies ("Alliance for Catholic Education") and Notre Dame concedes, the program has a significant religious component. The issue is whether the religious component was financed in whole or part by the grant from the Department of Education. That issue cannot be resolved by reference to the home pages. The ACE programs at the various schools are funded by private donations as well as by the Department of Education. As long as the religious component is financed entirely by the private donations, there is no violation of the establishment clause, which has been interpreted as not forbidding grants of public money to religious institutions as long as the grants are limited to the institutions' secular activities *E.g., Bowen v. Kendrick*, 487 U.S. 589, 608-09, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988); *Hunt v. McNair*, 413 U.S. 734, 742-43, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (plurality opinion). This is the critical question and it is not answered by the materials in the record.

Other issues as well may become critical on remand. Suppose it turns out that some part of the grant to Notre Dame was used to defray the cost of religious activities at the other schools. Several possibilities would then heave into view. One is that the grant was entirely proper because it contained adequate safeguards against the use of the money for religious activities, *e.g., Bowen v. Kendrick, supra*, 487 U.S. at 614-15, 108 S.Ct. 2562; *Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606, 612-13 (7th Cir. 2001); *American Jewish Congress v. Corporation for*

National & Community Service, 399 F.3d 351, 358 (D.C. Cir. 2005); *Columbia Union College v. Oliver*, 254 F.3d 496, 506 (4th Cir. 2001)—including safeguards that would prevent the direct recipient, Notre Dame, from allowing the money to be used by the recipient institutions for religious activities—and the grant was simply misused by Notre Dame or the recipient institutions. In that event there would be no violation of the establishment clause and again the case would be at an end, though the Department of Education might have a claim against Notre Dame and the other institutions for violating the terms of the grant, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 776-77, 780, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); even a qui tam action would be conceivable.

We do not think that *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), abolished the requirement that there be safeguards to prevent the diversion of grants to religious institutions from secular to sectarian activities. In that case a federal program paid for public school teachers to be sent into parochial schools (as well as other private schools) to teach special-education classes. The teachers were not chosen for this duty on the basis of their religious beliefs or affiliations, and the Court thought the risk that they would smuggle religious instruction into their classes, merely because of the parochial-school setting, was remote. The Court would not "presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees." *Id.* at 234, 117 S.Ct. 1997 (emphasis in original); cf. *Mitchell v. Helms*, 530 U.S. 793, 818-20, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality opinion). Similarly in *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002), the school-voucher case, the parents

selected the school, so there was no risk that the voucher money would be steered by a religious institution to a religious use. The steering was done by parents, and parents are not religious institutions. *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), is a similar case.

The situation in *Nyquist* was different. The program at issue there provided, among other things, public funds for the maintenance and repair of private schools, most of them sectarian. The funding was sufficiently generous that a school might be able to finance its entire maintenance and repair expense out of it, in which event there could be no argument that the funds were being used to defray merely the secular activities of the school. Likewise in this case, where money was being given to a religious program with a secular component, it was important that there be some mechanism for limiting the use of the money to the secular component. It is unclear from the record whether there was an adequate mechanism and if so whether it was used to prevent a diversion to forbidden purposes. *Freedom from Religion Foundation, Inc. v. Bugher, supra*, 249 F.3d at 612-14.

Mindful that to insist on too elaborate a monitoring mechanism could inject the government too deeply into the affairs of religious institutions (the dread "entanglement" of which the cases speak), we do not suggest that the Department of Education or Notre Dame was required to institute and operate an elaborate scheme of audits and on-site visits. But given the well-known temptation of educational institutions to divert grants made for one purpose to another that the institution considers more pressing, just writing a check for the support of an explicitly religious program that has a secular component is not enough. See *id.* at 613. This is not to say that religious institutions require greater supervision than other federal grantees. The only relevance of the religious context is that religion is an example of an activity that a grant of federal moneys may not be used to support. Suppose the grant was to Harvard University to support biochemical research. The grantor

would want to make the limited scope of the grant clear. It would not just write a check to Harvard, because it would worry that Harvard might arbitrarily allocate a portion of the grant to general university overhead. The grantor would insist that the grant contract contain language designed to prevent such a diversion.

Still another possibility is that the grant was improper because it lacked adequate safeguards but that Notre Dame reasonably believed it proper and was not complicit in any religious spending by the recipient organizations; such a showing would go far toward establishing the defense of reasonable reliance that we discussed earlier.

And perhaps Notre Dame will want to bring the recipient institutions into the case, since they obtained a more direct benefit than Notre Dame from the allegedly unlawful grant. (Which is not to say that Notre Dame derived no benefit; it doubtless obtains favorable publicity from the replication of its program by other schools. It probably requested the earmark.) All are matters to be sorted out on remand. The suit was dismissed prematurely.

Vacated and Remanded.

SYKES, Circuit Judge, dissenting.

This case is moot. The majority keeps it alive by declaring the availability of a form of restitutionary relief that was not sought by the plaintiff taxpayers and is inconsistent with the doctrine of taxpayer standing under *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), a limited exception to the general rule that citizens lack standing to sue in federal court on generalized grievances about the conduct of government. The Supreme Court has steadfastly refused to expand *Flast* and has never recognized private party repayment to the Treasury as an appropriate remedy for an Establishment Clause violation in a suit based on taxpayer standing. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 621-22, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 479-82, 102 S.Ct. 752, 70

L.Ed.2d 700 (1982); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 767 n. 23, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 175, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *Lemon v. Kurtzman*, 411 U.S. 192, 208-09, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973) ("*Lemon II*").

Against this backdrop, the majority holds that a recipient of a federal grant may be ordered to repay the grant as a remedy in a taxpayer lawsuit alleging that the government violated the Establishment Clause in making or insufficiently monitoring the grant. The majority achieves this result by importing the common law doctrine of restitution—a private law concept—into the public law realm of Establishment Clause litigation, vesting taxpayers with a unique sort of qui tam-like authority to sue private parties for reimbursement of the Treasury when the government is alleged to have committed an Establishment Clause violation. And the majority does this even though the claim against the government's representative is itself moot, making the newfangled remedy against the grant recipient the sole basis for the taxpayers' standing to pursue the Establishment Clause claim. This is a dramatic expansion of taxpayer standing, and there is no authority for it. I must respectfully dissent.

In December 2003 the plaintiff taxpayers brought this suit against the Secretary of the Department of Education seeking to enjoin payment of a congressional grant awarded in 2000 to the University of Notre Dame for a teacher training program. Called the Alliance for Catholic Education ("ACE"), the program trained teachers to work in Catholic schools serving underprivileged students in poor neighborhoods; it was replicated by Notre Dame at four partner colleges and universities. The taxpayers alleged the ACE grant violated the Establishment Clause and sought injunctive relief enjoining the Secretary to withdraw the Department's approval for it. They did not move for a preliminary injunction. Notre Dame was permitted to intervene as a defendant, but the plaintiffs did not amend their complaint to assert any alternative or additional form

of relief against Notre Dame. More specifically to the point here, the plaintiffs did *not* sue for *any* form of monetary relief.

In 2004, while the suit was still pending in district court, the grant appropriation expired by its own terms. Because it was a one-time only congressional earmark, now expired, and Notre Dame had received and either spent or disbursed the entire grant amount to its ACE partner universities, an ongoing alleged constitutional violation no longer existed. The taxpayers had sued only for prospective injunctive relief, but there was nothing left to enjoin. The district court dismissed the case as moot.

On appeal, the taxpayers concede that their original claim to enjoin the Secretary to withdraw approval for the grant is moot. *See Burke v. Barnes*, 479 U.S. 361, 363, 107 S.Ct. 734, 93 L.Ed.2d 732 (1987) (a challenge to the validity of a statute is mooted when the statute expires by its own terms); *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414-15, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972); *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003). They insist, however, that the case is not moot because another form of injunctive relief is available should they prevail on the merits. They contend the district court can enjoin the Secretary to seek recoupment of the grant under the Federal Claims Collection Act and Department of Education regulations empowering the Secretary to recover grant money spent in a manner inconsistent with the constitutional and regulatory requirements governing the grant. *See* 31 U.S.C. §§ 3701(b)(1)(C), 3711(a)(1); 34 C.F.R. §§ 74.73(a), 75.532. They assert that this form of relief—an injunction requiring the Secretary to seek recoupment of a misspent grant—is meaningful relief sufficient to avert a finding of mootness. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992).

The majority rejects this contention, for good reason. The court has no authority to order the Secretary to seek recoupment from Notre Dame. An agency's decision not to take an enforcement action is within the discretion of the agency and is

not reviewable. *See Heckler v. Chaney*, 470 U.S. 821, 831-33, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). In addition, federal regulations specifically provide that the Federal Claims Collection Act does not create a private right of action. *See* 31 C.F.R. § 900.8.

The majority thus holds, and I agree, that the taxpayers' claim for injunctive relief is indeed moot. Maj. op. at 933. This should end the matter, because the taxpayers did not sue or argue for any other relief. It is well-settled that when a plaintiff challenges the validity of a statute and seeks *only* prospective injunctive relief, the repeal or expiration of the statute "ends the ongoing controversy." *Fed'n of Adver. Indus. Representatives*, 326 F.3d at 930. In the absence of a damages claim or some basis for application of the voluntary cessation doctrine (not at issue here), the entire case is moot. *Id.* at 929-30. But the majority goes on to hold that the mootness of the injunctive claim does not moot the entire case because "the district court can simply order Notre Dame to return the [grant] money to the treasury" and that such an order would be a "routine instance[ ] of restitution." Maj. op. at 934-935. To the contrary, such an order would be neither simple nor routine. In the context of a taxpayer suit alleging an Establishment Clause violation, such an order would be extraordinary and unprecedented.

First, it bears repeating that the plaintiff taxpayers did not make a restitution-based argument, either in the district court or on appeal; no monetary claim, restitutionary or otherwise, was made in this case. A waived claim "cannot supply the residual live controversy necessary to prevent [the plaintiffs'] entire claim from being moot." *Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 588, 2006 WL 784953, at *9 (7th Cir. Mar. 29, 2006). Needless to say, declaring the existence of a novel compensatory remedy against a private party in a taxpayer lawsuit alleging an Establishment Clause violation is a judicial act of significant import. It should not be undertaken in the absence of an actual claim for this form of relief and full briefing by the parties. *See McNeil v. Wisconsin*, 501 U.S. 171, 181 n. 2, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) ("What makes a system adversarial rather

than inquisitorial is ... the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties."). Under these circumstances, Notre Dame would be justified to think itself sandbagged; it had no notice and no reason to expect when it moved to intervene that this injunction action might morph into a claim for restitutionary monetary relief on appeal.[1]

Moreover, and perhaps more importantly, adapting the common law doctrine of restitution to fashion a remedy in a taxpayer suit for an alleged Establishment Clause violation is like trying to pound the proverbial square peg into a round hole. Restitution is a private law equitable doctrine that orders liability and remedies between private individuals based on unjust enrichment; it has no application in a suit by taxpayers raising an Establishment Clause challenge to a congressional appropriation. It certainly cannot operate as the sole basis for standing in an otherwise moot taxpayer suit.

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[1] The majority responds that the Federal Rules of Civil Procedure generally permit the court to substitute other forms of relief for those originally sought in the pleadings. Maj. op. at 935. This misses the point. To repeat the chronology: the plaintiffs sued the Secretary of Education, not Notre Dame. When Notre Dame intervened to protect its interest in the ongoing grant, the plaintiffs did not seek *any* form of relief against Notre Dame. When the grant expired, raising the mootness question, the plaintiffs argued only that they are entitled to an injunction ordering the Secretary to seek recoupment of the grant, *not* that they are entitled to an order of restitution against Notre Dame. The majority asserts that although the plaintiffs "originally" sought a remedy against the Secretary alone, in reality they have been pursuing a remedy against Notre Dame all along and are now just "cutting out the middleman" by "chang[ing] ... the form of relief sought." Maj. op. at 935. This is untrue. The plaintiffs *never* argued that they are entitled to a restitutionary remedy against Notre Dame. The majority has *sua sponte* injected the theory of restitution into this case, unbidden by the plaintiffs and utterly without support in the taxpayer standing case law. *See infra* pp. 942-946. The rules of procedure do not permit the court to invent a new remedy in favor of plaintiffs who have not requested it in a case that is otherwise moot.

The Supreme Court has characterized the doctrine of mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (internal quotations and citations omitted). The Court has also made it clear that "a plaintiff must demonstrate standing separately for each form of relief sought." *Id.* at 185, 120 S.Ct. 693. Although the plaintiff taxpayers did not seek or argue for restitution, the majority holds that Notre Dame can be ordered to return the grant money to the Treasury, and the availability of this restitutionary remedy forestalls mootness. Implicit in this holding is a subsidiary one: that taxpayers have standing to sue a private federal grant recipient for restitution where the government is alleged to have committed an Establishment Clause violation in making or monitoring the grant. Taxpayer standing under *Flast* has never been understood to encompass such a claim.

Constitutional standing requires, "at an irreducible minimum," that the party invoking the court's authority "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge*, 454 U.S. at 472, 102 S.Ct. 752 (internal quotations and citations omitted); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). These Article III case-or-controversy requirements serve to "limit the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.' " *Valley Forge*, 454 U.S. at 472, 102 S.Ct. 752 (quoting *Flast*, 392 U.S. at 97, 88 S.Ct. 1942).

Generalized grievances by citizens or taxpayers are insufficient to establish standing to challenge a statute in federal court. *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67

L.Ed. 1078 (1923). The party invoking the power of judicial review "must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 488, 43 S.Ct. 597. A taxpayer's "interest in the moneys of the treasury ... is shared with millions of others [and] is comparatively minute and indeterminable," and the effect of a challenged statute on an individual citizen's tax burden is too "remote, fluctuating and uncertain" to constitute a cognizable injury for standing purposes. *Id.* at 487, 43 S.Ct. 597.

The Supreme Court has deviated from the general rule against taxpayer standing only once, holding in *Flast* that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8 of the Constitution," and only when the taxpayer can "show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Flast*, 392 U.S. at 102-03, 88 S.Ct. 1942. Because the Establishment Clause is a specific limitation on congressional taxing and spending authority, the Court held in *Flast* that the taxpayer plaintiffs had a sufficient stake in the outcome of the litigation to support standing. *Id.*

The Supreme Court has subsequently characterized *Flast* as having created a "narrow exception" to the *Frothingham* bar against taxpayer standing, *Kendrick*, 487 U.S. at 618, 108 S.Ct. 2562, and has repeatedly declined to expand its scope. *See Valley Forge*, 454 U.S. at 476-82, 102 S.Ct. 752; *Schlesinger*, 418 U.S. at 228, 94 S.Ct. 2925; *Richardson*, 418 U.S. at 175, 94 S.Ct. 2940. *Valley Forge* makes the important point that *Flast* did not relax the injury-in-fact and redressability requirements for constitutional standing in Establishment Clause cases and should not be read as a general authorization of all taxpayer claims in the Establishment Clause context. *Valley Forge*, 454 U.S. at 488-90, 102 S.Ct. 752. The Court specifically rejected

the argument that "enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege distinct and palpable injury to himself ... that is likely to be redressed if the requested relief is granted." *Id.* at 488, 102 S.Ct. 752 (internal quotations and citations omitted).

The majority opinion does not directly address the standing question. Instead, it simply asserts that restitution is appropriate relief here because it would rectify the depletion of the federal Treasury that occurred when the Secretary disbursed the grant money to Notre Dame in alleged violation of the Establishment Clause. Maj. op. at 933. But taxpayer standing under *Flast* is not premised upon injuries to the public fisc; taxpayers in these suits are not vindicating losses sustained by the Treasury. *Flast* left the general principles of *Frothingham* in place: the effect of a congressional enactment on an individual citizen's tax burden is too minute, and a taxpayer's interest in money in the Treasury is too diffuse, to support standing to sue in federal court. Taxpayers have standing under *Flast* to raise Establishment Clause challenges to actions by Congress under the taxing and spending power of Article I, Section 8 for the purpose of halting the unconstitutional exercise of that power. The *Flast* exception to the *Frothingham* bar against taxpayer suits extends no farther than this.

The majority also does not explain how the putative availability of restitutionary relief against a private party intervening defendant can supply standing in a taxpayer suit under *Flast* when the entire case against the government's representative is moot. There is no longer a live controversy against the Secretary of Education for an Establishment Clause violation because there is no remedy that can be ordered against her. The concrete adversity that existed between the taxpayers and the Secretary when the grant was ongoing evaporated with the expiration of the grant, making the question of the grant's constitutionality a completely academic matter. The taxpayers' standing to pursue their Establishment Clause challenge is now based on—what? A common law claim against Notre Dame for

unjust enrichment based on the government's alleged Establishment Clause violation?

Such a claim is unknown to the law, probably because private parties cannot be held liable for Establishment Clause violations. The majority dismisses this rather fundamental objection, asserting that if the taxpayers can prove that "the Department of Education wrongfully took their tax money and gave it to Notre Dame, the district court can order Notre Dame to return the money to the U.S. Treasury." Maj. op. at 934. The majority characterizes this as a "routine instance[ ] of restitution," *id.*, but the doctrine of restitution is entirely incompatible with the limited *Flast* exception to the *Frothingham* bar against taxpayer standing.

Restitution is an elastic doctrine that has both remedial and substantive aspects: it is remedial when invoked as a measure of recovery for an independent civil wrong and substantive when it is the sole source of a defendant's liability. 1 Dan B. Dobbs, The Law of Remedies § 4.1, at 552 (2d ed. 1993); Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1284-85 (1988-1989). Either way, restitution is premised upon unjust enrichment: the conferral of a benefit by the plaintiff on the defendant under circumstances in which the retention of the benefit would be unjust.

As applied to a private party defendant in a *Flast* taxpayer lawsuit, restitution could be classified only as a substantive claim for relief, not merely a type of remedy. Because a private party cannot violate the Establishment Clause, unjust enrichment would be the only source of the private party's liability in this context. But a federal taxpayer does not by paying his taxes confer a benefit on a federal grant recipient in any meaningful sense; the connection between an individual citizen's tax payment and any given federal grant recipient is nonexistent, or at least far too attenuated to support an unjust enrichment cause of action or provide a basis for standing to sue a private party defendant on an Establishment Clause claim. *See Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130 ("[I]njury in fact" for standing

purposes must be "concrete and particularized," not "conjectural or hypothetical"; "fairly trace[able] to the challenged action of the defendant"; and it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." (alterations in original) (internal quotations and citations omitted)). The conceptualization suggested by the majority is inapt; this is not at all "like a case of money received by mistake and ordered to be returned to the rightful owner." Maj. op. at 934-935. A taxpayer in an Establishment Clause lawsuit based on *Flast* standing does not possess qui tam-like authority to force private parties to return federal grant money to the Treasury.

The majority states categorically that "restitution is among the remedies that a federal court can order for a violation of federal law." Maj. op. at 935. But Notre Dame is not alleged to have violated any federal law. This is a taxpayer suit seeking to enjoin a congressional enactment alleged to violate the Establishment Clause. The majority also asserts that restitution is a "standard remedy" that can be ordered in "public-law as well as private-law cases." Maj. op. at 934. But the two cases cited for this proposition involved suits by the United States to recover costs incurred by the federal government to remediate a private party's violation of a statutory environmental clean-up duty. *See Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 203-05, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967) (suit by the United States against shipping company to recover costs incurred by the government in recovering and removing a sunken vessel from a navigable waterway pursuant to 33 U.S.C. § 409, the Rivers and Harbors Act of 1899); *United States v. P/B STCO 213*, 756 F.2d 364, 374 (5th Cir. 1985) (suit by the United States against barge owner to recover costs incurred by the government to clean up an oil spill pursuant to 33 U.S.C. § 1321(f)(1), the Federal Water Pollution Control Act). These cases do not support the majority's theory that an individual federal taxpayer can pursue a restitutionary remedy against a private party for repayment of the Treasury in a lawsuit alleging an Establishment Clause violation by the government.

The majority suggests that the Supreme Court's opinions in *Roemer*, *Lemon II*, and *New York v. Cathedral Academy*, 434 U.S. 125, 98 S.Ct. 340, 54 L.Ed.2d 346 (1977), demonstrate that there is "no per se rule that the recipient of illegal funds who has spent them cannot be forced to repay them, either in establishment clause cases or in any other class of cases." Maj. op. at 936. This rather overstates the question; in any event, the cases cited do not demonstrate the absence of a rule inhibiting the result the majority achieves here.

Lemon II and *Cathedral Academy* simply do not address the question of whether a recipient of government funds can be forced to repay them on a later determination in a taxpayer lawsuit that the appropriation was unconstitutional. In *Lemon II*, private sectarian schools in Pennsylvania incurred expenses in connection with a statutory provision allowing the state to reimburse the schools for certain secular educational services. The expenses at issue were incurred by the schools but had not yet been paid by the state. The statute was held unconstitutional in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) ("*Lemon I*"), and the question in *Lemon II* was whether to enjoin Pennsylvania from paying the reimbursement claims as a retrospective remedy for the Establishment Clause violation declared in *Lemon I*. The Supreme Court, in a four-justice plurality opinion (with a fifth justice concurring in the judgment), declined to enjoin payment, affirming the district court's order allowing the state to pay the schools' reimbursement claims. *Lemon II*, 411 U.S. at 208-09, 93 S.Ct. 1463. *Lemon II* thus permitted a government payment to be made in spite of a constitutional infirmity; this hardly provides a basis for requiring the *return* of money already paid.

Cathedral Academy involved a claim by a sectarian school for reimbursement of expenses incurred under a New York statute that had been declared unconstitutional under the Establishment Clause; an injunction prohibiting the payments had been issued by the district court, and the New York legislature responded by adopting a statute permitting payment notwithstanding the injunction. *Cathedral Acad.*, 434 U.S. at 127-28, 98 S.Ct. 340.

The school brought suit for reimbursement on the authority of the new statute, and the Supreme Court struck it down on Establishment Clause grounds and disallowed payment of the claim. *Id.* at 133-34, 98 S.Ct. 340. *Cathedral Academy* does not support the majority's position; a decision enjoining a government payment not yet made is not authority for requiring the return of a government grant already disbursed and spent.

Finally, *Roemer* was a three-justice plurality opinion, and the discussion of the plaintiff taxpayers' claim that private sectarian colleges should be forced to refund amounts paid under an unconstitutional pre-*Lemon I* Maryland statute was relegated to a footnote. *Roemer*, 426 U.S. at 767 n. 23, 96 S.Ct. 2337. The Court simply affirmed the lower court's application of *Lemon II* and declined to order the schools to repay the state, noting that "the separation of church and state may well be better served by not putting the State of Maryland in the position of a judgment creditor of the appellee colleges." *Id.* The taxpayers' claim that the colleges must return amounts already paid was thus rejected in *Roemer*; nothing in the plurality's footnote can be read to suggest that ordering private grant recipients to refund spent grant money is an ordinary and accepted remedy in Establishment Clause cases.

The more important point, however, is that the majority misreads *Lemon II, Cathedral Academy*, and *Roemer* as decisions about merits-based factual defenses premised upon reasonable reliance. They were not. *Lemon II* addressed whether *Lemon I* should be applied retroactively—a legal issue that at the time turned on a balancing of equitable interests, including reasonable reliance. *Lemon II*, 411 U.S. at 197-201, 93 S.Ct. 1463; *see also Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). *Cathedral Academy* and *Roemer* involved applications of *Lemon II*. Retroactivity law has changed, *see Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), but the material point for our purposes is that *Lemon I, Cathedral Academy*, and *Roemer* dealt with the legal issue of retroactivity and do not support the majority's holding that restitution from a private party defendant

is an available remedy in a taxpayer suit for an Establishment Clause violation, subject only to a merits-based reasonable reliance defense.

The majority posits the example of a $100 million congressional earmark to the Scottish Episcopal Church for ministers' salaries, disbursed in full the day after its enactment. Because an injunction "would come too late to provide any relief to the complaining taxpayers" in this situation, the majority "cannot think of any reason why [restitutionary] relief should not be possible." Maj. op. at 934. The hypothetical is far-fetched. Assuming such a flagrantly unconstitutional appropriation could escape notice during the entire Article I lawmaking process, any congressman or senator who voted for it would have some serious explaining to do in the next election cycle after it was discovered. The checks and balances of the ballot box are an effective disincentive against such unlikely and obvious congressional misuses of taxpayer money. Separation of powers requires the judicial branch to assume the general competence of Congress to enact laws that are constitutional. The law of taxpayer standing under *Flast* does not now encompass a restitutionary remedy against a private party in an Establishment Clause lawsuit. We need not create one as a hedge against congressional mischief of the sort described in the majority's fanciful hypothetical.

The test for mootness is not an invitation to explore the outer limits of the court's creativity in fashioning a remedy. It is, rather, a practical legal inquiry: within the confines of the recognized causes of action and remedies for which the plaintiff has standing, can the court grant meaningful relief? Here, the answer is no. The majority has expanded taxpayer standing under *Flast* far beyond its existing boundaries and declared a form of relief that was not sought by the plaintiff taxpayers and is not appropriate in Establishment Clause cases. The expiration of the ACE grant moots this case in its entirety. I would affirm the district court's order dismissing the lawsuit.

IN THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

JOAN LASKOWSKI and
DANIEL M. COOK,
Plaintiffs,

vs.

MARGARET SPELLINGS, in her official capacity as Secretary of the United States Department of Education,
Defendant,

and

UNIVERSITY OF NOTRE DAME,
Defendant-Intervenor.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

1:03-cv-1810-LJM-WTL

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on Cross Motions for Summary Judgment filed by the Plaintiffs, Joan Laskowski and Daniel M. Cook ("Plaintiffs"), Defendant Margaret Spellings ("Spellings"), and Defendant-Intervenor the University of Notre Dame ("Notre Dame") (collectively "Defendants"). Plaintiffs allege that Spellings, Secretary of the United States Department of Education ("DOE"), violated the Establishment clause by providing federal funding to Notre Dame's Alliance for Catholic Education ("ACE") replication program when eligibility for grant P116Z000012 (the "Grant") was not determined neutrally, the Grant was not allocated based on private choices, and the Grant money was not tracked or monitored to ensure that it was not actually diverted to religious use. *See* Pl.'s Br. Supp. at 1.

For the reasons stated herein, the pending Summary Judgment motions are **DENIED AS MOOT** and the case is hereby **DISMISSED** with prejudice.

I. DISCUSSION

Under Article III, "cases that do not involve actual, ongoing controversies are moot and must be dismissed for lack of jurisdiction." *Wisconsin Right to Life v. Schober*, 366 F.3d 485,490-91 (7th Cir. 2004) (internal quotations omitted). Mootness is often described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id.* at 491 (citing *Arizonans for Official English v. Arizona*, 520 US. 43, 68 n. 22 (1997); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)).

This case concerns a Fiscal Year 2000 Congressional earmark Grant awarded to Notre Dame. *See* Pub. Law 106-113 § 309 (Nov. 29, 1999). Notre Dame applied to the DOE for $462,500 to work with four other colleges and universities to replicate its ACE program. Def.'s Exh. 1 at DOE 00008-0024. In June 2000, the DOE awarded Notre Dame the Grant for the period from January 6, 2000, to December 31, 2004. Stip. to Facts, ¶¶ 4, 8; Def.'s Exh. 2 at DOE 00025-00027. The Grant monies were spent on salary, benefits, and travel expenses for the director and associate director of the ACE program and copying of documents. Def's Exh. 12 at DOEO2562, DOE02563, DOE02574. As of December 8, 2004, all of the funds had been withdrawn from the account. *See* Johnson Decl. ¶ 5. Plaintiffs, federal taxpayers, filed this lawsuit on December 2, 2003, and their amended complaint on December 11, 2003. *See* Docket Nos. 1, 6. Defendant filed its answer on March 2, 2004, and discovery remained open until October 11, 2004. *See* Doc. Nos. 26, 45.

Defendants argue that Plaintiffs' Establishment Clause challenge to the Grant is moot because the Grant period expired as of December 31, 2004, and the funds have been spent as of

December 8, 2004. A claim must be dismissed as moot "if an event occurs [pending review] that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895). A change in circumstances after the filing of the lawsuit, such as the repeal (or expiration) of the challenged statute, may moot a claim. *See e.g., Fed'n of Adver. Indus. Reps., Inc. v. City of Chi.*, 326 F.3d 924, 929 (7th Cir. 2003) (citing *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994) ("As a general rule, if a challenged law is repealed or expires, the case becomes moot" except where "it is virtually certain that the repealed law will be reenacted.")).

Because the challenged Grant appropriation no longer exists, there ordinarily can be no real controversy as to its validity. Plaintiffs' Amended Complaint requests injunctive and declaratory relief to enjoin Spellings to withdraw her approval of the Grant. *See* Amend. Comp., ¶ 1. While it may have been a proper remedy before the Grant expired to ask the Court to enjoin Defendant to withdraw his approval of the Grant, that remedy is no longer appropriate.[1]

Plaintiffs go to great lengths to explain the difficulties the Indiana Civil Liberties Union ("ICLU") encountered in submitting Freedom of Information Act ("FOIA") Requests. *See*

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[1] To the extent that Plaintiffs seek injunctive relief barring any potential future funding by the DOE for replication of the ACE program or declaratory relief that such funding would be unconstitutional under their general prayer for "all other proper relief," *see* Amend. Comp., such challenge is not ripe for review. *See Perry v. Sheahan*, 222 F.3d 309, 313 (7th Cir. 2001) (plaintiff had no standing to seek prospective relief because he "alleged only past injury, and cannot demonstrate a realistic threat" of future injury). Moreover, federal courts do not, as a rule, enjoin conduct that has been discontinued with no real prospect that it will be repeated. *See Ragsdale v. Turnock*, 841 F.2d 1358, 1365-55 (7th Cir. 1988), *appeal dismissed*, 503 U.S. 916 (1992). No evidence has been submitted by the parties indicates that a similar Grant will be applied for or issued.

Pl.'s Resp. Br. at 2-4. More specifically, Plaintiffs allege that the DOE flagrantly violated the FOIA for over two years, and thereby delayed Plaintiffs' filing of the suit. While the ICLU may have submitted its first FOIA request to the DOE on July 9, 2001, if the ICLU believed that defendant had violated the FOIA, it could have filed suit for the documents in August 2001, under FOIA itself. *See* 5 U.S.C. §§ 52(a)(6)(A)(I), 552(a)(6)(C)(I) (deeming requestor to have exhausted administrative remedies if agency fails to comply with request for records within twenty business days of receipt, and allowing filing of suit). Instead, Plaintiffs continued to write letters, threatening suit only two years later, in July 2003. Rather than suing under the FOIA years ago to obtain the documents they claim were not forthcoming from the DOE or seeking emergency relief once suit was actually filed, Plaintiffs allowed the Grant period to end, and the money to be spent.[2]

Plaintiffs also argue that the alleged Establishment Clause violation would be remedied if the DOE were ordered by the Court to recoup the Grant funds. *See* Pl.'s Resp. Br. at 1. Plaintiffs request such relief under their general prayer for "all other proper relief." *See* Amend. Comp. Even if the Court were to accept this relief as being appropriately pled, which is disputed by the parties, such a prayer does not constitute a monetary damages claim. While courts have held that a demand for money damages may save a claim from being moot, Plaintiffs' claim for recoupment is not such a form of relief. *See Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748, 751 (7th Cir. 2002) ("suits seeking money damages, as [plaintiff] does, cannot become moot

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[2] True, as Plaintiffs point out, the suit was filed weeks before the end of the Grant period and days before the last of the Grant funds were dispersed. However, Article III requires that there be a live controversy at the time a court decides a case, not just when the case was filed. *See Burke v. Barnes*, 479 US. 361, 363 (1987). There exists no such live controversy in this case.

unless the defendant satisfies the plaintiff's demand"). *See also Cass County Music Co. v. Muedini*, 55 F.3d 263, 264 n.4 (7th Cir. 1995); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990), *cert. denied*, 501 U.S. 1206 (1991).

If monetary damages were sought as an appropriate remedy for a harm caused by the conduct of the Defendants, the Plaintiffs' claim may have been justiciable. But that is not the case here. Plaintiffs seek only a form of equitable relief by requesting that the Court order the DOE to recoup funds dispersed under the Grant, thereby restoring the funds to their rightful owner. "Damages," on the other hand, has a commonly understood meaning: it generally connotes payment in money for a plaintiff's losses caused by a defendant's breach of duty, and is different from equitable restitution. *See U.S. v. Balistrieri*, 981 F.2d 916,928 (7th Cir. 1992) (citing *Rogers v. Loether*, 467 F.2d 1110, 1121-22 (7th Cir. 1972)). Moreover, the Plaintiffs have not provided, nor has the Court found, any case law to support Plaintiffs' position that the equitable remedy sought saves their claim from being dismissed on justiciability grounds.

II. CONCLUSION

For the foregoing reasons, the Court **DISMISSES AS MOOT** Plaintiffs, Joan Laskowski and Daniel M. Cook, Defendant Margaret Spellings, and Defendant-Intervenor's the University of Notre Dame, cross-motions for summary judgment, and the case is hereby **DISMISSED** with prejudice.

IT IS SO ORDERED this 13th day of May, 2005.

Larry J. McKinney
Chief Judge
United States District Court
Southern District of Indiana

No. 06-582

In the Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME, PETITIONER

v.

JOAN LASKOWSKI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether a federal taxpayer may pursue an equitable restitution claim against a private grantee in federal court, where the underlying Establishment Clause claims against the federal government are moot and any recouped funds would be paid into the United States Treasury rather than to the plaintiff.

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In the Supreme Court of the United States

No. 06-582

THE UNIVERSITY OF NOTRE DAME, PETITIONER

v.

JOAN LASKOWSKI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-26a) is reported at 443 F.3d 930. The opinion of the court of appeals denying the petitions for rehearing (Pet. App. 1a-3a) is reported at 456 F.3d 702. The opinion of the district court (Pet. App. 27a-31a) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 13, 2006. Petitions for rehearing were denied on July 26, 2006 (Pet. App. 1a-3a). The petition for a writ of certiorari was filed on October 24, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner developed a specialized program called Alliance for Catholic Education, which has successfully trained

teachers to work in disadvantaged and underserved schools. Pet. 2-3; Pet. App. 4a-5a. The program contains both secular and religious components. Pet. App. 4a-5a. In 2000, Congress earmarked a grant of approximately $500,000 for a "teacher quality initiative," which the Secretary of Education was to award to petitioner to permit it to replicate its program. *Id.* at 4a, 28a; see Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 309, 113 Stat. 1501A-262.

The Secretary subsequently awarded the funds to petitioner, after receiving assurances that petitioner would comply with the regulations, policies, guidelines, and requirements imposed by the Secretary on federally funded projects, Laskowski C.A. App 21, including 34 C.F.R. 75.532 (2000), which precluded the use of grant funds to pay for "(1) [r]eligious worship, instruction, or proselytization"; "(2) [e]quipment or supplies to be used for any of those activities"; "(3) [c]onstruction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of those activities"; and "(4) [a]n activity of a school or department of divinity."[1] The grant period ran from January 6, 2000, through December 31, 2004. Pet. App. 28a. After receiving the grant, petitioner entered into sub-grant agreements with four colleges and universities to implement its teacher initiative. Those sub-grant agreements included the same restrictions against the use of grant funds for religious purposes. See *ibid.*; Laskowski C.A. App. 47, 57, 62, 82.

2. In December 2003, Laskowski and Cook (respondents) filed suit against the Secretary of Education challenging the grant on Establishment Clause grounds. Pet. App. 28a. The sole ground for standing asserted was respondents' status as federal taxpayers. Amended Compl. 2, 4. The complaint

[1] The regulation has since been amended to remove subsections (3) and (4). See 34 C.F.R. 75.532; see also 69 Fed. Reg. 31,708-31,717 (2004).

sought declaratory and injunctive relief against the Secretary, as well as attorney's fees and other "proper relief" against the Secretary. *Id.* at 4-5. Petitioner subsequently intervened as a defendant in the litigation. Pet. App. 27a. Respondents never amended their complaint to assert any claims against or to seek any form of relief from petitioner.

While the case was pending in district court, the grant period expired and all of the grant funds were expended. Pet. App. 28a-29a. The district court then dismissed the case as moot, *id.* at 27a-31a, "[b]ecause the challenged Grant appropriation no longer exists," making the requested "injunctive and declaratory relief to enjoin [Secretary of Education] Spellings to withdraw her approval of the grant * * * no longer appropriate," *id.* at 29a. Because there was "no real prospect that [the grant] will be repeated," the court also rejected as "not ripe" a request for injunctive relief against "potential future funding" of petitioner's program. *Id.* at 29a n.1.

Finally, the district court rejected respondents' argument that the case was not moot because the court could enjoin the Secretary to recoup the grant funds. The court noted that there was a question whether that claim for relief had been "appropriately pled," and further held that it would not be a proper exercise of the equity power to grant such relief in light of the cessation of the grant. Pet. App. 30a-31a. Respondents did not argue that any relief was available against petitioner that might save the case from mootness.

3. a. A divided court of appeals vacated and remanded. Pet. App. 4a-26a. The court agreed with the district court that respondents' claim for injunctive relief against the Secretary of Education was moot due to the cessation of the grant and the unlikelihood of any renewal. *Id.* at 5a. The court also agreed that the court could not enjoin the Secretary to recoup the funds because "courts are not authorized to review a deci-

sion not to take an enforcement action; such decisions are within the absolute discretion of the enforcement agency" and are "well outside judicial competence." *Id.* at 6a-7a (citing *Heckler* v. *Chaney*, 470 U.S. 821 (1985)).

The majority nevertheless held that the case was not moot because "the depletion of the federal treasury by the amount of the grant" still "can be rectified simply by the restoration of the money to the U.S. Treasury." Pet. App. 5a-6a. The majority held that the district court could "simply order [petitioner] to return the money to the treasury." *Id.* at 7a. Permitting a private plaintiff to seek the same recoupment of funds to the Treasury that the court could not compel the Secretary to pursue, the majority reasoned, would "avoid needless circuity" by "cutting out the middleman." *Id.* at 9a. The majority deemed the Political Branches' traditional control over the Treasury to be "merely a detail" that "has no practical significance" to the remedial question, *id.* at 8a-9a.

b. Judge Sykes dissented. Pet. App. 14a-26a. Because the Establishment Clause applies only to government action, and because the lawsuit against the government is moot, she would have dismissed the case. *Id.* at 16a-17a. She described as "unknown to the law," *id.* at 22a, the majority's "newfangled" theory that the plaintiffs could obtain, not for themselves but for the federal Treasury, restitution relief against petitioner for the Secretary's alleged violation of the Establishment Clause, *id.* at 15a. She further noted that respondents themselves had never requested any such relief against petitioner "either in the district court or on appeal," *id.* at 17a, and argued that "[t]he rules of procedure do not permit the court to invent a new remedy in favor of plaintiffs who have not requested it in a case that is otherwise moot," *id.* at 18a n.1. Beyond that, she explained that restitution "is a private law equitable doctrine" that "has no application in a suit

by taxpayers raising an Establishment Clause challenge." *Id.* at 18a.

Judge Sykes further disagreed with the majority's assumption that taxpayer standing could support such a restitution claim. Judge Sykes explained that taxpayer standing has been limited to challenges to exercises of Congress's taxing and spending power, Pet. App. 20a, and does not extend to "[a] common law claim against Notre Dame for unjust enrichment based on the government's alleged Establishment Clause violation," *id.* at 22a. In her view, the limited exception for taxpayer standing carved out by this Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968), does not vest federal taxpayers with "qui tam-like authority to force private parties to return federal grant money to the Treasury." Pet. App. 23a. She reasoned that "the connection between an individual citizen's tax payment and any given federal grant recipient is nonexistent, or at least far too attenuated to support an unjust enrichment cause of action or provide a basis for standing to sue a private party defendant on an Establishment Clause claim." *Id.* at 22a.

4. The court denied the government's and petitioner's petitions for rehearing and rehearing en banc. Pet. App. 1a-3a. Judges Manion, Kanne, and Sykes voted in favor of rehearing en banc. See Order Denying Reh'g En Banc (July 26, 2006); see also *Freedom from Religion Found., Inc.* v. *Chao*, 447 F.3d 988 (7th Cir. 2006) (Easterbrook, J., concurring in the denial of rehearing en banc) (noting that there is "considerable force" "in the standing analysis of Judge Sykes' dissent" in the instant case, and that "[t]wo divided decisions on related matters that put the judicial and the political branches of the federal government at odds imply the wisdom of further

review" by this Court), cert. granted, No. 06-157 (Dec. 1, 2006).[2]

DISCUSSION

Building on its unprecedented expansion of taxpayer standing in *Freedom from Religion Foundation, Inc.* v. *Chao*, 433 F.3d 989 (2006), cert. granted, No. 06-157 (Dec. 1, 2006), the Seventh Circuit held that the taxpayer standing doctrine vests private plaintiffs with "qui tam-like authority" (Pet. App. 15a (Sykes, J., dissenting)) to file restitution actions against *private parties* to recoup funds on behalf of the federal Treasury. The court made that extraordinary ruling in a case that was moot, and it crafted its "newfangled remedy," *ibid.*, without the benefit of briefing or argument on the question by the parties. The court of appeals' decision clearly disregards this Court's taxpayer-standing precedents and departs from established principles of judicial restraint in constitutional cases. Nonetheless, because this Court has already granted review to address the Seventh Circuit's sweeping conception of taxpayer standing in *Freedom from Religion Foundation*, *supra*, the Court should hold this petition pending disposition of that case.

1. The initial action brought by respondents against the Secretary of Education involved a traditional exercise of taxpayer standing under *Flast* v. *Cohen*, 392 U.S. 83 (1968), because it challenged the exercise of Congress's use of its taxing and spending power to provide an earmarked $500,000 grant to petitioner, which was to be administered by the Secretary. Once those grant funds were expended, however, the case against the Secretary became moot and respondents' taxpayer standing to challenge the grant expired. The court of appeals nevertheless permitted the action to continue by allowing the

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[2] Judges Ripple and Williams were recused from the case. See Order Denying Reh'g En Banc 2 n.* (July 26, 2006).

taxpayers to bring a restitution action on behalf of the federal Treasury against the private party that received the grant. By expanding taxpayer standing to include quasi-common-law actions against private entities that are designed not to remedy any individualized injury suffered by the plaintiff, but to "rectif[y] * * * the depletion of the federal treasury," Pet. App. 5a, the court of appeals' decision conflicts sharply with decisions of this Court.

a. Article III of the Constitution confines the judicial power to the resolution of actual "Cases" and "Controversies." U.S. Const. Art. III, § 2. An "essential and unchanging" component of that requirement is the rule that a plaintiff invoking the jurisdiction of the federal courts must have standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing" requires that the plaintiff, *inter alia*, "have suffered an 'injury in fact'" in the form of the "invasion of a legally protected interest," that is both "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 560 (citations omitted).[3]

This Court has generally rejected taxpayer status as a sufficient basis on which to predicate Article III standing, because a federal taxpayer's interest in the moneys of the treasury "is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating

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[3] To establish standing, a plaintiff also must identify a "causal connection between the injury and the conduct" of which he complains, such that the alleged injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court," and the plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-561 (internal quotation marks and citations omitted).

and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Frothingham* v. *Mellon*, 262 U.S. 447, 487 (1923). "Standing has been rejected in such cases because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally,'" and because the injury "is not 'actual or imminent,' but instead 'conjectural or hypothetical.'" *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1862 (2006) (citations omitted).

In *Flast* v. *Cohen*, *supra*, this Court recognized a narrow exception to the general prohibition on taxpayer standing. The Court held that a taxpayer could bring an Establishment Clause challenge to Congress's exercise of its taxing and spending power to provide federal funding to private religious schools. See 392 U.S. at 102-104. The Court underscored, however, that taxpayer standing would extend "only [to] exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution" that are challenged on Establishment Clause grounds. *Id.* at 102.[4] That narrow departure from Article III's general prohibition on taxpayer standing was warranted, the Court stated, because "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Flast*, 392 U.S. at

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[4] *Flast* also held that the taxpayer must allege that Congress's exercise of its legislative power "exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power," like the Establishment Clause, 392 U.S. at 102-103. The Court has never held that any other constitutional constraint on Congress's taxing and spending power would support taxpayer standing. See *DaimlerChrysler*, 126 S. Ct. at 1864 ("[O]nly the Establishment Clause has supported federal taxpayer suits since *Flast*.") (internal quotation marks and citation omitted).

103. The Court thus grounded the type of personal injury needed to establish taxpayer standing in this context on the historic constitutional concern that a taxpayer not be "force[d] * * * to contribute three pence only of his property for the support of any one establishment." *Ibid.* (citation omitted). Given the unique constitutional and historical pedigree of that concern, the Court held that an individual's claim that "his tax money is being extracted and spent in violation of [that] specific constitutional protection[] against such abuses of legislative power" could support Article III standing. *Id.* at 106.

b. In the ensuing four decades, this Court has consistently reaffirmed that *Flast* is a "narrow" and rarely invoked exception to the rule that taxpayer status is insufficient to establish Article III standing. *DaimlerChrysler*, 126 S. Ct. at 1865; see also *Bowen* v. *Kendrick*, 487 U.S. 589, 618 (1988) ("we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing established in *Frothingham*"); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 481 (1982) (discussing the "rigor with which the *Flast* exception to the *Frothingham* rule ought to be applied").

Last Term, the Court reiterated that *Flast* has a "narrow application in our precedent," *Daimler-Chrysler*, 126 S. Ct. at 1865, and is strictly limited to a claim that "congressional action under the taxing and spending clause is in derogation of the Establishment Clause," *id.* at 1864 (quoting *Flast*, 392 U.S. at 105-106). The Court stressed that taxpayer standing exists in that particular context—and no other—because Congress's "extract[ion] and spen[ding] of tax money in aid of religion," is "fundamentally unlike" an alleged violation of "almost any [other] constitutional constraint on government power," given the historical constitutional imperative of pro-

tecting citizens against "contribut[ing] three pence . . . for the support of any one [religious] establishment." *Id.* at 1864-1865. Thus, "the 'injury' alleged in Establishment Clause challenges to federal spending" that may give rise to standing is "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion alleged by a plaintiff." *Id.* at 1865.

Likewise, in *Valley Forge Christian College*, the Court emphasized that the *Flast* exception must be applied with "rigor," 454 U.S. at 481, and rejected taxpayer standing where the plaintiffs challenged "not a congressional action, but a decision by [a federal agency] to transfer a parcel of federal property," *id.* at. 479. The Court explained that, while the agency's actions necessarily entailed the use of tax money, "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing." *Id.* at 477. Rather, the Court reaffirmed, taxpayer standing is confined to "challenges directed only [at] exercises of congressional power." *Id.* at 479 (internal quotation marks omitted). A constitutional objection to "a particular Executive Branch action arguably authorized by [an] Act [of Congress]" will not suffice. *Id.* at 479 n.15.[5]

Finally, in *Bowen* v. *Kendrick*, the Court reaffirmed that taxpayer standing does not exist to challenge, on Establishment Clause grounds, "an incidental expenditure of tax funds in the administration of an essentially regulatory statute."

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[5] See also *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227-228 (1974) (finding no taxpayer standing in a suit where the plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status"); *United States* v. *Richardson*, 418 U.S. 166, 175 (1974) (holding that a taxpayer lacks standing to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the Central Intelligence Agency, because that challenge was "not addressed to the taxing or spending power, but to the statutes regulating the CIA").

487 U.S. at 619 (quoting *Flast*, 392 U.S. at 102). As in *Flast*, the Court held that taxpayer standing permitted the plaintiffs to challenge on its face and as applied a statute permitting the distribution of federal grant money to private entities, including religious organizations. See 487 U.S. at 618. The Court explained that a challenge to "administratively made grants" fits *Flast*'s mold because the authorizing statute "is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the [Act]'s statutory mandate." *Id.* at 619-620.

The fact that the plaintiffs in *Kendrick* challenged not only the funding statute itself, but also the Executive Branch's distribution of funds to particular entities was consonant with *Flast*'s narrow reach, the Court explained, because the claim that "funds are being used improperly by individual grantees is [no] less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary [of Health and Human Services]." 487 U.S. at 619. The key point was that the taxpayers' allegations "call[ed] into question how * * * funds authorized by Congress are being disbursed pursuant to * * * statutory mandate." *Id.* at 620.

c. The court of appeals' holding that federal taxpayer standing extends to support actions against private defendants to recoup funds for the federal Treasury defies that precedent.

First, an essential prerequisite to taxpayer standing is a "challenge[] directed *only* [at] exercises of congressional power" under the Taxing and Spending Clause. *Valley Forge*, 454 U.S. at 479 (emphasis added; internal quotation marks omitted); *Flast*, 392 U.S. at 106 (challenge must be to "con-

gressional action under the taxing and spending clause" alleged to be in derogation of the Establishment Clause); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 225 n.15 (1974) ("[T]he *Flast* nexus test is not applicable where the taxing and spending power is not challenged.").

The equitable restitution action that the court of appeals fashioned in this case challenges the expenditure of funds by a private entity, not an exercise of Congress's taxing and spending power. The challenge here is not to the constitutionality of the congressional funding program, but is actually a dispute over whether the private party reasonably complied with the terms of the grant. Yet disputes over whether grant recipients comply with funding conditions are not limited to the Establishment Clause context, and they do not justify a use of taxpayer standing.

Indeed, in the court of appeals' view, the central issue on remand will be common-law conceptions of "reasonable reliance" by a private party. Pet. App. 10a; see *id.* at 9a-14a. While the alleged unconstitutionality of congressional action may provide a predicate for recovery, *id.* at 12a, it would not be sufficient to prevail. To support the action, taxpayer standing will have to extend beyond that constitutional question into litigating the private-law question of the reasonableness of the private party's reliance on the propriety of the grant. *Id.* at 10a. But that question has nothing to do with Congress's exercise of its taxing and spending power.

Second, taxpayer standing exists "only" to challenge governmental conduct in derogation of the Establishment Clause. *DaimlerChrysler*, 126 S. Ct. at 1864. Private entities like petitioner, however, are not subject to the Establishment Clause and are incapable of violating it. Recovery in respondents' restitution claim will turn largely on whether petitioner acted in derogation of common-law principles of reasonable reliance, rather than Establishment Clause principles. How-

ever, under this Court's cases, respondents' taxpayer standing extends no further than resolution of that constitutional question—a question about governmental conduct that is indisputably moot in this case. *Ibid.*

Third, as this Court recently reemphasized, taxpayer standing supports prospective relief aimed at halting "the very 'extract[ion] and spen[ding]' of 'tax money.'" *DaimlerChrysler*, 126 S. Ct. at 1865 (quoting *Flast*, 392 U.S. at 106). "[A]n injunction against the spending would of course redress *that* injury." *Ibid.* Likewise, in *Bowen*, the Court described a present and ongoing predicate injury in how funds "are being disbursed" by the government. 487 U.S. at 620.

The retrospective recoupment of funds that have long-since left the control of the government, by contrast, does not redress any individualized interest in avoiding "contribut[ing] three pence . . . for the support of any one [religious] establishment." *DaimlerChrysler*, 126 S. Ct. at 1864 (quoting *Flast*, 392 U.S. at 103). Congress's extraction and spending of taxpayer dollars to fund the grant to petitioner is over and done with. Indeed, the court candidly acknowledged that the restitution action it devised is not aimed at protecting the interests of individual taxpayers, but at rectifying "the depletion of the federal treasury." Pet. App. 5a. That is precisely the type of attenuated "interest in the moneys of the Treasury" that this Court has consistently held does *not* support taxpayer standing. *DaimlerChrysler*, 126 S. Ct. at 1862; *Frothingham*, 262 U.S. at 486-487; see *Valley Forge*, 454 U.S. at 485 n.20. "An interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vermont Agency of Natu-*

ral Res. v. *United States ex rel. Stevens*, 529 U.S. 765, 772 (2000).[6]

2. By vesting private plaintiffs with the "qui tam-like authority" (Pet. App. 15a (Sykes, J., dissenting)) to bring a judicially created cause of action to vindicate the federal Treasury, the court's decision transgresses the constitutional separation of powers. The court of appeals acknowledged that it lacked the "competence" to "take over the prosecutorial function" and superintend the government's decision to recoup governmental funds. *Id.* at 7a. But the court nevertheless assumed the authority to "cut[] out the middleman"—the Executive Branch—and create a new cause of action whereby courts may deputize private plaintiffs to assume the very prosecutorial function the court of appeals had just eschewed. In the court's eyes, the Executive Branch's constitutionally prescribed role in ensuring the faithful execution of the laws is "merely a detail" and "of no practical significance" to the court's authority to vindicate the federal Treasury. *Id.* at 8a-9a.

But the separation of powers is not "needless circuity," Pet. App. 9a. The Constitution charges the Political Branches with protecting and preserving the federal fisc and, in particular, "secur[ing] the treasury or the government against financial losses, including requiring reimbursement for injuries." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 314-315 (1947). It is the Executive's task to "take care that the laws be faithfully executed," U.S. Const. Art. II, § 3, not the

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[6] In *Vermont Agency*, this Court held that qui tam relators have Article III standing to vindicate the public fisc and receive a statutory "bounty" only because Congress, in the False Claims Act, "effect[ed] a partial assignment of the Government's damages claim." 529 U.S. at 773. But neither Article III nor the Establishment Clause vests the Judiciary with the authority to assign to private plaintiffs the government's claims to allegedly misspent grant funds.

courts and not private parties. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985); see also *OPM* v. *Richmond*, 496 U.S. 414, 425 (1990) (the Judicial Branch's Article III powers are "limited by a valid reservation of congressional control over funds in the Treasury"). The government's decision to enforce or not to enforce funding conditions "is a decision generally committed to an agency's *absolute* discretion." *Heckler*, 470 U.S. at 831 (emphasis added). The majority's assumption of the unilateral power to appoint private attorneys general to vindicate the interests of the Treasury in Establishment Clause cases flouts those principles, and raises additional constitutional concerns under the Appointments Clause, U.S. Const. Art. II, § 2. See *Vermont Agency*, 529 U.S. at 778 n.8.

Although the majority relied (Pet. App. 9a-10a) on *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976), *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), and *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977), those cases in fact significantly undercut the court's holding. A plurality in *Lemon* held that a *State* could use taxpayer funds to reimburse school districts for costs they had reasonably incurred prior to the invalidation of a funding program. 411 U.S. at 207-209 (opinion of Burger, C.J.). In so holding, the court stressed that federalism principles precluded judicial imposition of "draconian, retrospective decrees" that punished reasonable adherence to "legislative directives." *Id.* at 207. Those same considerations of judicial restraint and federalism equally foreclose the imposition of draconian retrospective remedial schemes on grantees. See Amicus Br. of Indiana, *et al.*, 5-7.

Cathedral Academy likewise involved a prospective state effort to pay reimbursement, not a private action to recoup past funding. 434 U.S. at 130-134. Finally, the footnoted discussion of repayment in *Roemer* was dicta in a three-Justice plurality opinion, and even there the plurality opined that "the separation of church and state may well be better served

by not putting the State of Maryland in the position of a judgment creditor of the appellee colleges." 426 U.S. at 768 n.23 (opinion of Blackmun, J.).

3. Like *Freedom from Religion Foundation*, *supra*, this case raises important questions of constitutional law concerning the delicate balance of power between the Judicial and Executive Branches. Indeed, as the Court observed last Term, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court-jurisdiction to actual cases or controversies," including the standing requirement. *DaimlerChrysler*, 126 S. Ct. at 1861 (internal quotation marks omitted). The Seventh Circuit's unprecedented expansion of taxpayer standing in a manner that undermines the Political Branches' control over the federal Treasury threatens the very accretion of judicial power against which this Court's taxpayer-standing cases have consistently cautioned.

The constitutional concerns raised by the court's decision do not stop there. Established principles of judicial restraint require that courts not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton* v. *United States*, 196 U.S. 283, 295 (1905); see *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). But the case that respondents brought—the constitutional claims they asserted and the remedies they sought—are moot. The court's unilateral expansion of taxpayer standing to formulate an entirely novel cause of action and a remedy that respondents never sought against a defendant against whom they never asserted any claims stands that principle of judicial restraint on its head. In addition, the court of appeals' decision ignores this Court's admonition in *Valley Forge* that "[p]roper regard for the complex nature of our constitutional structure requires" that courts not "hospitably accept for adjudication" claims resting

on nothing more than an alleged affront to taxpayers. 454 U.S. at 474.

The court's dramatic expansion of taxpayer standing also is likely to have a substantial chilling effect on the willingness of private organizations to participate as providers of secular government services pursuant to federal grants or contracts. See Pet. 25-26; Thomas More Amicus Br. 5-16. Such organizations—including numerous charitable and non-profit organizations providing critical secular services, such as job training, educational tutoring, and food and shelter for the neediest of citizens—now face the threat of protracted recoupment litigation at the instigation of any one of the of the more than 11 million federal taxpayers within the Seventh Circuit inclined to seek reimbursement of federal funds that were long ago received and spent. Indeed, one district court, relying on the court of appeals' decision in this case, recently ordered a state grantee to repay $1.5 million to the Iowa state treasury. See *Americans United for Separation of Church & State* v. *Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 938, 941 (S.D. Iowa 2006). Yet this Court has cautioned that those who cooperate with legislative programs should not have to proceed at "the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional." *Lemon*, 411 U.S. at 207 (opinion of Burger, C.J.).

4. For the foregoing reasons, the Seventh Circuit erred in vesting taxpayers with standing and a judicially created cause of action to seek reimbursement of the federal Treasury through restitution actions against private grantees. The court's decision significantly departs from this Court's precedent. In addition, the question presented is important in light of the separation-of-powers concerns created by the court's decision and the potential chilling effect on the willingness of

private organizations to participate as the providers of secular services in important government programs.

In *Hein* v. *Freedom from Religion Foundation, Inc.*, No. 06-157 (Dec. 1, 2006), this Court recently granted review to address the Seventh Circuit's expansive conception of taxpayer standing, including the extent to which such litigation is confined to challenges to an exercise of Congress's taxing and spending power. See 06-157 Pet. 14-16. This case likewise reflects an abandonment of established limitations on taxpayer standing, but it also raises separate and distinct separation-of-powers concerns because the court has created a new cause of action that permits private plaintiffs to bring restitution actions to reimburse the public fisc. Even where taxpayer standing otherwise exists to maintain an Establishment Clause claim against the federal government, there is no constitutional, precedential, or other basis for the extraordinary remedial action fashioned by the court below.

In short, the sensitive constitutional questions implicated by the court of appeals' decision and its potentially far-reaching legal and practical implications merit this Court's action. Nevertheless, the Court's disposition of *Hein* may provide guidance relevant to the court of appeals' decision in this case and could potentially obviate the need for this Court' s plenary review. Accordingly, the Court may wish to hold the petition pending the Court's decision in *Hein*.

CONCLUSION

For the foregoing reasons, the Court should hold the petition for a writ of certiorari pending this Court's decision in *Hein* v. *Freedom from Religion Foundation, Inc.*, No. 06-157.

Respectfully submitted.

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No. 06-582

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In The

Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME,

Petitioner,

v.

JOAN LASKOWSKI, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this case is ripe for review by this Court where there has been no final judgment or relief issued in the case, where the Petitioner may ultimately prevail by reason of the subsequent final result in this case, and where any alleged error created by the Seventh Circuit's non-final judgment can be fully rectified by this Court in a later petition for review of the final judgment.

2. Whether the Petitioner has presented compelling reasons to grant the Petition, where the Seventh Circuit's decision that a taxpayer has standing to challenge a Congressional expenditure made under the Tax and Spending Clause is entirely consistent with *Flast v. Cohen*, 392 U.S. 83 (1968), and all other relevant precedent of this Court and does not conflict with any decision of another court of appeals.

3. Whether the Petitioner has presented compelling reasons to grant the Petition, where the Seventh Circuit's unremarkable decision that this cause is not moot because the remedy of restitution is still available is not in conflict with any decision of this Court or any other court of appeals.

PARTIES TO THE PROCEEDING

Petitioner is the University of Notre Dame and Respondents are Joan Laskowski and Daniel M. Cook.

Margaret Spellings, in her official capacity as Secretary of the United States Department of Education, was a Defendant below. However, she has not sought a writ of certiorari in this case.

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INTRODUCTION

The Petitioner, University of Notre Dame ("Notre Dame"), has provided no compelling reason why this Court should grant its Petition for a Writ of Certiorari. There has been no final decision in this case: neither the trial court nor the Seventh Circuit reached the issue of whether a First Amendment violation had occurred. Rather, the court of appeals' decision merely held that, when the government has violated the Establishment Clause in granting federal aid, one possible remedy is that the grantee who has used the federal grant funds for religious purposes can be required to provide restitution by returning the misused grant funds to the government. *See Laskowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006), *rehearing denied*, 456 F.3d 702 (7th Cir. 2006). Thus, the court of appeals held only that it is *possible* that a remedy would be available in this case *if* the plaintiff Indiana taxpayers prevail on the merits of the case on remand. Because there has been no final order in this case, and the case could still be resolved on remand based on issues that the Seventh Circuit has not yet considered, this matter is not ripe for review by this Court.

Moreover, Notre Dame has not cited, and cannot cite, to one case from this Court or any other court that conflicts with the Seventh Circuit's decision. Although Notre Dame argues at length that the court of appeals' decision is in conflict with *Flast v. Cohen*, 392 U.S. 83 (1968), the opposite is true: Judge Posner's majority opinion is in perfect conformity with *Flast* and all other relevant precedent of this Court. In fact, the real issue in this case is not whether there is taxpayer standing, but whether or not the case became moot after its filing for lack of a remedy. The Seventh Circuit's decision reaches the unremarkable conclusion that the case is not moot because, if

the taxpayers prevail on the merits of their Establishment Clause claim on remand, the lower court may order the University of Notre Dame to repay the misused grant funds to the United States Department of Education. This conclusion does not conflict with any decision of this Court or other courts of appeals. There is no basis for this Court to grant a writ of certiorari in this case, and the Petition should be denied.

STATEMENT OF THE CASE

In 1999, Congress earmarked a $500,000 "Fund for the Improvement of Post Secondary Education" ("FIPSE") grant to be given to Notre Dame as a United States Department of Education ("DOE") appropriation for Fiscal Year 2000. *See* Consolidated Appropriations Act of 1999, Pub. L. No. 106-113, §309, 113 Stat. 1501, 1501A-261 to 262. This money was to be used by Notre Dame to replicate at other private universities its "Alliance for Catholic Education" ("ACE") program, a teacher education program that includes an essential religious component to it. The DOE awarded the FIPSE grant to Notre Dame in 2000, and the grant expired on December 31, 2004.

Indiana taxpayers ("Taxpayers")[1] initiated this action in December 2003 as a complaint against the DOE for injunctive and declaratory relief, challenging the FIPSE grant to Notre Dame on the grounds that this direct federal aid violated the Establishment Clause of the First

[1] Although Notre Dame refers to them as "alleged" taxpayers (Pet. at 5), it is undisputed that the respondents are federal taxpayers, as the parties stipulated to this fact.

Amendment to the United States Constitution. Notre Dame subsequently intervened in this cause as a defendant. In November 2004, the plaintiff Taxpayers filed their motion for summary judgment, in which they requested that the DOE be required to recoup any spent grant funds from Notre Dame. In January 2005, the DOE and Notre Dame filed cross-motions for summary judgment, in which they alleged that the FIPSE grant funds had been fully dispersed and spent by December 8, 2004. The district court dismissed the case as moot and denied all pending motions for summary judgment because the FIPSE grant had already expired and the grant funds had already been spent. *See* Pet. App. at 27a-29a.

The Seventh Circuit Court of Appeals vacated the district court decision. Judge Posner's majority opinion held that, although the Taxpayers' claim for injunctive relief was moot, the entire case was not moot because Notre Dame could still be required to restore the grant funds to the U.S. Treasury. *See Laskowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006), *reh'g denied*, 456 F.3d 702 (7th Cir. 2006). Therefore, the case was remanded to the district court for a determination on the merits and, if the Taxpayers prevail on the merits, a determination as to whether Notre Dame has any defense to an order of restitution. *See id.* at 936, 937-39. Judge Sykes dissented. *See id.* at 939-46. Petitions for rehearing and rehearing en banc were denied. *See* 456 F.3d 702.

REASONS FOR DENYING THE PETITION

A. This Case Is Not Ripe for Review by This Court as There Has Been No Final Judgment

Except in extraordinary cases, this Court typically awaits final judgment in the lower courts before exercising its certiorari jurisdiction. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (Court is ordinarily reluctant to exercise its certiorari jurisdiction prior to entry of a final judgment in the lower courts.); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Am. Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893) (noting that this Court should not review non-final lower court orders "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"). There is good reason for this general rule against review of non-final orders, for "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *Am. Constr. Co.* 148 U.S. at 384. Moreover, this Court may always review non-final orders in a later petition for a writ of certiorari, after final judgment has been rendered. *Va. Military Inst.*, 508 U.S. 946 (citing *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)).

In this case, there has been no decision on the merits of the Taxpayers' Establishment Clause claim; thus, there has been no decision that the Taxpayers are entitled to any remedy at all. Rather, the court of appeals simply ruled that this case was dismissed prematurely because the remedy of restitution is possible *if* the Taxpayers ultimately prevail on the merits. *Laskowski*, 443 F.3d at 936. That determination rests on issues that have yet to be

considered. First, the Taxpayers must show on remand that the government has violated the Establishment Clause. As Judge Posner points out, if the district court finds on remand that "the grant was entirely proper because it contained adequate safeguards against the use of the money for religious activities," then the government has not violated the Establishment Clause and this case is at an end, even if Notre Dame used the money for religious purposes.[2] *Id.* at 937. Moreover, even if the Taxpayers prevail on the merits of their Establishment Clause claim, the lower court must still decide whether Notre Dame has any legitimate defense to an order of restitution, such as reasonable reliance to its detriment on an honest belief that it was legally entitled to the grant funds.[3] *Id.* at 938-39.

There are too many potential variables in this case to merit review by this Court at this time. However, *if* the Taxpayers prevail on the merits on remand, and *if* Notre Dame cannot establish a defense to an order of restitution, then this Court can certainly review the issue of the appropriateness of the remedy of restitution at that time.

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[2] Of course, as the court of appeals noted, in such a situation the DOE would still have a claim against Notre Dame and/or its partnering institutions for violating the terms of the grant. *See id.* at 937.

[3] Thus, Notre Dame is incorrect when it claims the Seventh Circuit's decision "significantly alters the dispositive liability question from whether the Government violated the First Amendment to whether the recipient institution can be equitably deemed to have reasonably relied on the statutory grant." Pet. at 20-21; 22-23. Rather, Judge Posner specifically noted that the court on remand must first determine that the *Government* violated the Establishment Clause and, if it so determines, *then* decide whether Notre Dame has a defense to an order of restitution. *See Laskowski*, 443 F.3d at 936.

Cf. Va. Military Inst., 508 U.S. 946; *Hamilton-Brown Shoe Co.*, 240 U.S. at 258.

B. The Decision Below Does Not Conflict with Any Opinion of This Court or a Court of Appeals

Notre Dame's primary, if not sole, reason for granting its Petition is its claim that the decision below is an impermissible expansion of *Flast v. Cohen*, 392 U.S. 83 (1968). This is simply not true. *Flast* holds that taxpayers have standing to bring an Establishment Clause challenge to congressional expenditures under the Taxing and Spending Clause. That is precisely what the plaintiff Taxpayers have done in this case. Yet, despite *Flast*, Notre Dame argues that this case should have been declared moot once the challenged grant was fully spent. In ruling otherwise, however, the Seventh Circuit merely applied the well-settled rule that a case is not moot so long as the alleged constitutional violation is still susceptible to a judicial remedy. *See, e.g.*, *Caldron v. Moore*, 518 U.S. 149, 150 (1996). The decision below that Notre Dame may be required to repay the grant funds if there is an Establishment Clause violation is perfectly consistent with the decisions of this Court, and is not in conflict with any other court of appeals.

1. The Decision Below Is Entirely Consistent with *Flast* and Other Relevant Case Law Regarding Taxpayer Standing in Establishment Clause Cases

This case involves the straightforward application of well-established standing principles to litigation that is still at its preliminary stages. Ever since this Court's

decision in *Flast* forty years ago, it has been clear that taxpayers have standing to complain about a federal expenditure that they allege violates the Establishment Clause. *Flast*, 392 U.S. at 106 ("Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review.").[4]

Here, the Taxpayers have challenged a grant made by the DOE pursuant to a specific appropriation in the Omnibus Appropriations Act, Pub. L. No. 106-113 (2000), a statute that is clearly an exercise of congressional taxing and spending power.[5] More specifically, the Taxpayers allege that the specific congressional grant to Notre Dame by the DOE violates the Establishment Clause. Under *Flast* and its progeny, the court of appeals correctly found

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[4] Notre Dame repeatedly cites to cases that discuss general standing principles but do not address the unique standing requirements in a taxpayer Establishment Clause challenge to a government expenditure made under Congress' power to tax and spend. *See, e.g.*, Pet. at 9, 13. These citations are simply not helpful in determining whether standing exists under the limited circumstances addressed in *Flast* and this case.

[5] Thus, *Freedom from Religion Foundation v. Chao*, 433 F.3d 989 (7th Cir. 2006), *reh'g and reh'g en banc denied*, 447 F.3d 988 (7th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3065 (Aug. 1, 2006) (No. 06-157), cited extensively by Notre Dame, is inapplicable to this case. The issue in *Chao* is whether a taxpayer can have standing to bring an Establishment Clause claim when Congress did not specifically earmark money for the challenged program or activity. *See id.* at 990. That is simply not at issue in this case, as it is undisputed that the challenged grant is from a specific appropriation made by Congress pursuant to its power to tax and spend. Thus, even if this Court grants certiorari in *Chao*, there is no reason to do so in this case.

that the Taxpayers have established a logical nexus between their taxpayer status and their claim.

Notre Dame does not attack the Taxpayers' standing to complain about an ongoing expenditure of federal dollars on religious activity, but claims that the court of appeals erred in finding that the Taxpayers have standing to complain about an expenditure of federal dollars on religious activity that was fully spent during the pendency of this litigation.[6] Notre Dame claims that in this latter situation, there is no relief available to the Taxpayers, thus removing taxpayer standing. Of course, in order for standing to exist, there must be a "likelihood that the requested relief will redress the alleged injury," *Valley Forge*, 454 U.S. at 472, which in this case is the expenditure of federal funds for religious purposes. As a matter of common sense, that injury can be remedied either by stopping the expenditure from happening in the first place *or* by ordering that the taxpayer funds be returned to the federal treasury even after the expenditure has occurred.[7]

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[6] It is undisputable that the Taxpayers filed this lawsuit one year before the expiration of the challenged grant. Thus, Notre Dame's repeated references to the "long-ceased expenditures," *see, e.g.*, Pet. at 2, are not accurate.

[7] Notre Dame cites *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), for the proposition that private parties do not have standing to seek to "provide[ ] money to the federal treasury." Pet. at 16. However, neither *Steel Co.* nor any of the other cases cited by Notre Dame for this proposition are Establishment Clause cases. As *Flast* has made clear, the expenditure of federal monies for a religious purpose is injury to taxpayers; therefore, taxpayers *do* have standing to seek to protect the federal treasury, rather than themselves directly, in the limited circumstances of an Establishment Clause claim. *Flast*, 392 U.S. at 106 (to show a redressable injury, a taxpayer need only show that "his tax money is being extracted [from the federal treasury] and spent" in violation of the Establishment Clause). Notre Dame's claim to

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In either case, the injury is redressed because taxpayer money will not have been expended on the religious activity of the grant project.[8] Moreover, that the remedy for the injury is an order to the grantee to return the money, rather than an order to the grantor government to recoup the money, does not affect the Taxpayers' standing.[9] The court of appeals was correct in noting that either order would remedy the injury in this case. *See Laskowski*, 443 F.3d at 935.[10]

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the contrary is merely an attack on the well-established holding of *Flast*.

[8] Part of the evil to be avoided through the Establishment Clause is the public perception of government endorsement of religious activity. *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief. . . . "); *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."). In this case, if the government money is refunded, the perception of government endorsement of the religious activities of the ACE Replication program will be removed.

[9] Notre Dame alleges at various points that the Taxpayers "concede" that they have no remedy against the government at this point. The Taxpayers have never made any such concession. The Taxpayers continued to note, even in their brief opposing the petitions for rehearing, that the Seventh Circuit erred in holding that the court lacks authority to order the Secretary to seek recoupment of the federal funds as a remedy for her own Establishment Clause violation. *See infra* note 13 and accompanying text.

[10] Thus, Notre Dame is incorrect when it repeatedly alleges that the court of appeals' decision authorizes taxpayer standing based solely on the Taxpayers' financial interest in the Treasury. *See, e.g.*, Pet. at 14-15, 29-30. The Taxpayers' injury in this case, as in *Flast*, is not just the

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Notre Dame also argues that the Taxpayers no longer have a claim adverse to the government (and therefore lack standing) merely because the remedy for the Establishment Clause claim is an order that Notre Dame return the grant funds to the government.[11] However, the Taxpayers most certainly do have a claim antagonistic to the government. The Taxpayers' claim is that the government violated the Establishment Clause by failing to ensure through adequate monitoring that the federal taxpayer money it gave directly to Notre Dame was not used for religious purposes. *See Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973). This claim exists to this day, as the government has still not taken any steps to remedy its violation of the Establishment Clause. Because the government willfully refuses to remedy its own Establishment Clause violation, the Taxpayers have a "case or controversy" against the government.[12] The remedy for that

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expenditure, but government sponsorship of religious activity through the expenditure.

[11] Notre Dame oddly argues at the same time both that 1) the courts cannot order restitution because the DOE does not want the grant money back, and 2) the courts cannot order restitution because the DOE's interests are the same as the Taxpayers'. *See, e.g.*, Pet. at 5-6, 11. However, as to the first point, it is up to the courts, not the DOE, to decide whether the DOE has violated the Establishment Clause and, if so, to order an appropriate remedy. *Davis v. Passman*, 442 U.S. 228, 242 (1979); *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Crowell v. Benson*, 285 U.S. 22, 60 (1932); *cf., Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 69 (1992) ("[I]f a right of action exists to enforce a federal [statute] and Congress is silent on the question of a remedy, a federal court may order any appropriate relief."). As to the second point, the DOE does not have the same interest as the plaintiffs, since the DOE refuses to this date to correct its own Establishment Clause violation.

[12] Notre Dame also claims that there is no live case or controversy between the Taxpayers and the government because the relief sought will not come from the government. *See* Pet. at 11, 18-19. However, this

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controversy at this point is an order that Notre Dame provide restitution to the Taxpayers by returning the money to the government. That the government does not want, and has not sought, the money back is the very fact that creates the controversy between the Taxpayers and the government.

In short, the Seventh Circuit's holding that the Taxpayers have standing under *Flast* is unremarkable and fully consistent with this Court's precedent.[13]

Nor has Notre Dame been able to point to any court of appeals case that conflicts with the Seventh Circuit's decision. None of the cases cited by Notre Dame as allegedly showing a conflict involved Establishment Clause challenges to government financial aid. *See* Pet. at 24. Rather, in each of these cases the plaintiffs challenged a government *practice* as violating the Establishment Clause and the claims had become moot either because the

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claim simply ignores the unique circumstances of a taxpayer Establishment Clause claim challenging government financial aid to a third party. In any such case, the remedy will always be against the third party – either stopping the third party from receiving the funding or, as in this case, requiring the third party to return the funding improperly given. None of the cases cited by Notre Dame involve these unique circumstances, and they are therefore inapplicable.

[13] Notre Dame claims that the court of appeals' decision conflicts not only with *Flast*, but also with *Frothingham v. Mellon*, 262 U.S. 447 (1923), and *Doremus v. Bd. of Educ. Of Borough of Hawthorne*, 342 U.S. 429 (1952). *See* Pet. at 28. However, *Frothingham* did not deal with an Establishment Clause claim, and was specifically distinguished in *Flast* on that ground. *See Flast*, 392 U.S. at 104-05. In addition, the Court held that there was no taxpayer standing in *Doremus* only because there was no showing that taxpayer money actually had been spent on the challenged activity, *see* 342 U.S. at 433, a problem that clearly does not exist in this case. Consolidated Appropriations Act of 1999, Pub. L. No. 106-113, § 309, 113 Stat. 1501, 1501A-261 to 262.

plaintiffs were no longer subject to the practice, *see Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (*en banc*); *Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1477 (11th Cir. 1997), or because the practice had ceased, *see Chaudhuri v. Tennessee*, 130 F.3d 232, 235 (6th Cir. 1997).[14] The contrast in the present case is clear. As noted above, here the injury is not the religious activity itself, but the *sponsorship* of that religious activity through the expenditure of taxpayer money. Although the religious activity has already happened, the government sponsorship of that religious activity can still be remedied by a return of the taxpayer money to the government. Such a remedy would remove all public perception of government endorsement of religion.[15]

This case presents no conflict with any other court of appeals, and the Petition should be denied.

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[14] Moreover, the controversy in *Chaudhuri* was not even moot, as the plaintiff still had a live damages claim against the school. *See* 130 F.3d at 235.

[15] Nor does this case "exacerbate" the alleged "circuit split" regarding the application of Federal Rule of Civil Procedure 54(c). All of the cases cited at pp. 24-25 of the Petition involved situations where the plaintiffs had failed to request the relief at issue until the appellate stage of the litigation. Although these cases may have been wrongly decided against the plaintiffs, *see, e.g., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65-66 (1978), they are nevertheless inapplicable to this case. Here, the Taxpayers clearly requested at the trial court level that the grant money be returned to the government. In that situation, at least, it is clear that the plaintiffs are entitled to the requested relief even if it was not originally pled. *See id.* And, more to the point, under Rule 54(c) of the Federal Rules of Civil Procedure, the Taxpayers would be entitled to any available relief even if they had *never* asked for it. *See, e.g., Holt*, 439 U.S. at 65-66 ("[A] federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one.") (citing Rule 54(c)).

2. The Seventh Circuit's Decision That This Case Is Not Moot Because the Common Remedy of Restitution Is Available Is Not in Conflict with Any Decision of This Court or Other Courts of Appeals

The actual holding of the court of appeals was that this case is not moot because the remedy of restitution is available. Thus, the decision stands for the unremarkable proposition that a case is not moot when some meaningful relief is available. *See Caldron v. Moore*, 518 U.S. 149, 150 (1996). Notre Dame has not cited any case that conflicts with this well-established principle.[16] Nor is the court of appeals' decision of such import that it should be reviewed by this Court.

Although the courts can no longer remedy the Establishment Clause violation in this case by an order enjoining the DOE from giving the funds to Notre Dame in the first place, this case is not moot because the remedy of restitution is still available. Of course, an appeal must be dismissed as moot "when, by virtue of an intervening event, a court of appeals cannot grant any effectual relief

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[16] This Court never questioned taxpayers' standing to seek recoupment of government funds given and spent in violation of the Establishment Clause in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976) and *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*). In both of those cases, the Court merely decided that recoupment was not appropriate as an equitable remedy based on reliance interests developed in each record. *Roemer*, 426 U.S. at 767, n.23; *Lemon II*, 411 U.S. at 194. If anything, those cases demonstrate that the Seventh Circuit's holding is unremarkable and that this Petition is premature. In keeping with those earlier cases, Judge Posner expressly noted that recoupment may be inappropriate based on reliance interests that Notre Dame has yet to assert. That issue can and should be resolved in the first instance by the district court.

whatsoever in favor of the appellant." *Id.* (internal citation omitted). However, even the availability of a partial remedy is sufficient to avoid mootness. *Id.* (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)). Thus, the court of appeals correctly held that this case is not moot because the lower court can still order Notre Dame to provide restitution by returning the funds, to the extent that those funds were used for religious activity in violation of the Establishment Clause. *See Laskowski*, 443 F.3d at 934.

Restitution or unjust enrichment applies to, among other things, situations in which a person obtains the money or property of others without authority. *See, e.g.*, *P.R. Earling v. John Emigh*, 218 U.S. 27, 35 (1910) ("[A]s the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation."). Whether restitution should be ordered here depends on the eventual decision of the trial court. However, the Taxpayers contend that it is warranted because Notre Dame has received the Taxpayers' money pursuant to a grant from the federal government, and Notre Dame has used that money in a manner not contemplated by the grant or permitted under the Establishment Clause; that is, it used the money for religious activity. Thus, Notre Dame has been unjustly enriched by the grant funds.

"A person who has been unjustly enriched at the expense of another is required to make restitution to the

other."[17] RESTATEMENT OF RESTITUTION § 1 (1937); *see also, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (a plaintiff can "seek restitution in equity. . . . where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession"). And, as the court of appeals points out, a "[d]efendant may be unjustly enriched [even] without having committed any other civil wrong," as when the defendant is enriched by mistake. *Laskowski*, 443 F.3d at 935; *see also, e.g., United States v. Mead*, 426 F.2d 118, 125 (9th Cir. 1970) (Due solely to their unjust enrichment, student applicants for government aid could be liable in restitution for overpayments made to them by mistake and through no fault of their own, where they were aware that applicable regulations governed their aid.). Thus, even if Notre Dame committed no civil wrong because it cannot itself, as a private actor, violate the Establishment Clause, it can nevertheless, because of the unjust enrichment, be required to return the taxpayer money it used for religious activity.[18]

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[17] As the court of appeals noted, "[r]estitution is a standard remedy and one ordered in public-law as well as private-law cases." *Lakowski*, 443 F.3d at 934; *see also, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) (Government could enforce compliance with the Emergency Price Control Act by seeking an order that landlords who violated the Act provide restitution of rents to their tenants.).

[18] Moreover, even if Notre Dame cannot violate the Establishment Clause, it certainly is not an "innocent" party who committed no wrong whatsoever in this case. Rather, Notre Dame provided federal grant money to its partnering institutions along with a Statement of Work, which specifically noted that various religious activities were "essential" to the partners' programs, but then utterly failed to monitor the partners to ensure the federal grant money was not used for the essential religious components of each program. Of course, Notre Dame was and is fully

(Continued on following page)

Of course, in the typical restitution scenario, the unjustly enriched defendant must return the money to the plaintiff directly. However, this case involves an Establishment Clause claim brought by a taxpayer. In such cases, the taxpayer plaintiff will *never* be the one who receives a direct monetary benefit from his successful claim. *See, e.g., Nyquist, supra* (taxpayers who successfully challenged direct federal financial aid to non-public schools sought ruling that the aid was unconstitutional, not an order that the taxpayers themselves directly receive any money or other benefit); *Flast, supra* (federal taxpayers sought order preventing government from funding the purchase of textbooks for parochial schools, not an order that the taxpayers receive money directly). Thus, the fact that the order of restitution in this case would require Notre Dame to give the money back to the federal government rather than to the Taxpayers directly is simply an outgrowth of the fact that Establishment Clause claims challenging government expenditures are necessarily brought by taxpayers whose remedy is never a direct cash benefit but only protection of the federal treasury from the loss of the taxpayer money. Therefore, if a taxpayer successfully challenges a grant before it is given, the federal money remains with the federal government, not the taxpayer. If the taxpayer successfully challenges the grant after it is given, the money is returned to the federal government, not to the taxpayer. In either case, the taxpayer's injury is redressed.

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aware that both the terms of the grant and the First Amendment prohibit use of the grant funds for religion. Thus, Notre Dame's unjust enrichment is not just the government's fault, as Notre Dame seems to claim, but its own as well. The remedy of restitution is certainly just and equitable in this case.

Notre Dame makes a dire prediction that the *Laskowski* decision will have a "chilling effect" on potential religious grantees' willingness to seek federal funds. *See, e.g.*, Pet. at 25. However, no religious institution that plans to use government money in a lawful manner need fear an order of restitution of those funds. As the court of appeals points out, one of the defenses to a claim of restitution is that the grantee relied to its detriment upon a grant wrongfully given *and* "was merely an innocent conduit, neither knowing nor having reason to know that it was receiving an unlawful grant." *Laskowski*, 443 F.3d at 936. In such a situation, the grantee "would not have to make restitution." *Id.*; *see also, e.g.*, RESTATEMENT OF RESTITUTION, § 69.

In sum, the Seventh Circuit correctly held that there is no reason why the standard relief of restitution should not be possible in this case, *see Laskowski*, 433 F.3d at 934, and Notre Dame has cited no case that conflicts with this decision.

CONCLUSION

There is no final order in this case. There has been no finding on the merits of the Establishment Clause claim, and thus no order that Notre Dame provide restitution of the grant funds or provide any other relief. The lower court merely held that this case is not moot because there is still a remedy available should the Taxpayers ultimately prevail on the merits. This holding will become irrelevant if the Taxpayers do not prevail on their Establishment Clause claim. Moreover, there is nothing remarkable about the court's holding that a case is not moot when there is at least some

relief still available, nor is it in conflict with any decision of this Court or other courts of appeals. There is no reason for this Court to grant the Petition, and it should be denied.

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No. 06-582

IN THE

Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME,

Petitioner,

v.

JOAN LASKOWSKI, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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1. Today in *Hein v. Freedom from Religion Foundation, Inc.*, No. 06-157, the Court reversed the Seventh Circuit's judgment, holding that a federal taxpayer lacks standing to challenge ongoing Executive Branch use of general appropriations.

The Court's opinion, while it clarifies the scope of *Flast v. Cohen*, 392 U.S. 83 (1968), in the particular context of Executive Branch expenditures, does not resolve the issue presented by this Petition, whether a taxpayer may seek reimbursement from a *private entity* for *prior congressional* expenditures. In the Seventh Circuit, under this case, any federal taxpayer can mount a *post hoc* challenge to any congressional program on Establishment Clause grounds, in order to seek "restitution" from the grantee. Permitting taxpayers to sue private organizations, on behalf of the Government, for the Government's alleged past violations of the Constitution is an unwarranted and unwise expansion of taxpayer standing, which directly contradicts this Court's prior precedents. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105 (1998).

The jurisprudential and real-world effects of this case have national importance and should be addressed without further delay. As the Solicitor General argued to this Court in its brief in this case, the Seventh Circuit's opinion is an "extraordinary ruling" that "clearly disregards this Court's taxpayer-standing precedents and departs from established principles of judicial restraint in constitutional cases" and that "is likely to have a substantial chilling effect on the willingness of private [religious] organizations to participate as providers of secular government services pursuant to federal grants or contracts." Fed. Resp. Br. at 6, 17. The Solicitor General, however, suggested that certiorari need not be granted immediately, since it was possible that the Court's resolution of *Hein* might "provide guidance" or "obviate the need for this Court's plenary review." *Id.* at 18.

In fact, however, *Hein* did not resolve the issue presented here, so there is no longer any reason to wait. Specifically, the plurality found no standing "[b]ecause the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment . . . ." Slip op. at 18 (plurality op. of Alito, J.). *See also* slip op. at 12 (Scalia, J., concurring in the judgment). That holding does not encompass this case because the challenge here *is* "directed at an exercise of congressional power," slip op. at 18 (plurality op. of Alito, J.), rather than an unfettered Executive Branch decision. *See* Pet. at 4. Delay in resolving the precise issue here would also be harmful because, as Petitioner and the amici have noted in prior briefing, taxpayers are already seeking to use the Seventh Circuit's opinion to force private charities to "repay" millions of dollars for alleged prior Establishment Clause violations committed by the Government. *See* Pet. at 28; Reply Br. at 6; Br. for The Thomas More Law Center as *Amicus Curiae* Supporting Petitioner at 4.

2. As Justice Scalia noted in his opinion concurring in the judgment, moreover, *Flast* itself cannot be reconciled with this Court's modern standing principles. *See* slip op. at 16-21 (Scalia, J., concurring in the judgment). The doctrine, as it currently exists, in Judge Easterbrook's words with reference to this case and *Freedom from Religion Foundation*, is simply "arbitrary" and "illogical." *Freedom from Religion Foundation*, 447 F.3d 988, 989 (7th Cir. 2006) (order denying rehearing en banc) (Easterbrook, J., concurring). This Petition provides a good vehicle for the Court to re-examine the constitutional underpinnings of *Flast* and to provide a sound mooring for its taxpayer standing doctrine in the Establishment Clause context—an opportunity that at least two Justices suggested is welcome. Specifically, the second question presented in the petition here asks that *Flast* be overturned if it supports the result below.

For the reasons more fully stated in Petitioner's Petition and Reply Brief, this Court should grant certiorari.

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Constitution

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A. The Court Should Decide This Case Along With *Hein v. Freedom From Religion Foundation, Inc.*

1. On December 1, 2006, this Court granted certiorari in *Hein v. Freedom from Religion Foundation, Inc.*, 433 F.3d 989 (7th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3065 (U.S. Dec. 1, 2006) (No. 06-157),[1] to determine whether federal taxpayers have standing to mount an Establishment Clause challenge to dollars spent on an executive program unconnected to a specific congressional grant. Judge Easterbrook in his opinion concurring in the denial of rehearing en banc in *Freedom from Religion* also referred to this case and stated that this Court should resolve the "related matters" presented in both cases. 447 F.3d at 989 (order denying reh'g en banc) (Easterbrook, J., concurring). For a number of reasons, the Court should follow Judge Easterbrook's suggestion and grant certiorari here as well.[2]

First, for the reasons noted by the Solicitor General in the *Freedom from Religion* petition, permitting the decision below to stand will likely make the Seventh Circuit a nearly-universal destination for taxpayer actions. *See* Petition for a Writ of Certiorari, *Grace v. Freedom from Religion Found, Inc.*, No. 06-157 (U.S. Aug. 1, 2006). Any federal taxpayer in that Circuit with a generalized grievance concerning the government's religion-related speech will be able to mount a *post hoc* challenge to any such program, in order to seek "restitution" from the grantee. The Court's decision in *Freedom from Religion* will not change that fact. This threat is particularly acute, moreover, because the Seventh Circuit has found taxpayer standing to challenge "*any* expenditure"

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[1] The case was originally captioned *Freedom from Religion v. Chao* and, more recently, *Grace v. Freedom from Religion.*

[2] Petitioner has attached a copy of the order denying rehearing en banc that was inadvertently omitted from its Petition Appendix.

related to religious expression, even "piddling" ones, such as the $448.38 that the Indiana Legislature spent in connection with its legislative prayer. *See Hinrichs v. Bosma*, 440 F.3d 393, 397-98 (7th Cir. 2006) (emphasis in original).

The Court, more importantly, will have difficulty setting forth a comprehensive and coherent doctrine of taxpayer standing in the Establishment Clause context in *Freedom from Religion* without addressing the issue presented in this case. This decision is markedly more expansive than, and quite different from, *Freedom from Religion*. Resolving the question in *Freedom from Religion*—whether taxpayers are allowed to challenge ongoing Executive Branch use of general appropriations—will inherently say nothing about the issue here; *i.e.*, whether a taxpayer may seek *reimbursement* from a private entity for *prior congressional* expenditures.

As reflected in the various amicus briefs filed by religious organizations and State Attorneys General, the issue here is more important, both jurisprudentially and in real-world effects, than *Freedom from Religion*. This case presents threshold issues concerning the scope of, and rationale underlying, a taxpayer's ability to challenge expenditures that allegedly violate the Establishment Clause. As established in our Petition, the rule that a taxpayer has standing to seek reimbursement by a private entity for already-expended funds necessarily must be premised on the erroneous notion that taxpayers have a cognizable interest in the financial status of the Federal Treasury. Pet. at 14-16. *Freedom from Religion* presents no comparable issue relating to the principles underlying taxpayer standing, but only the technical question of whether *Flast v. Cohen*, 392 U.S. 83 (1968), should be extended beyond its facts to reach purely Executive Branch decision-making. Additionally, because of the second question presented here, this case, unlike *Freedom from Religion*, provides the opportunity to reexamine the underpinnings of *Flast*, if the Court is unable

to reconcile that decision with its more recent precedent governing standing.

The Federal Respondent acknowledges that the "extraordinary ruling" here "clearly disregards this Court's taxpayer-standing precedents and departs from established principles of judicial restraint in constitutional cases" and that the decision "is likely to have a substantial chilling effect on the willingness of private [religious] organizations to participate as providers of secular government services pursuant to federal grants or contracts." Fed. Resp. Br. at 6, 17. The Solicitor General also recognizes that this case "raises separate and distinct separation-of-powers concerns" than those presented in *Freedom from Religion*. *Id.* at 18. Notwithstanding these differences, the Solicitor General nevertheless raises, without explanation, the possibility that "the Court's disposition of [*Freedom from Religion*] may provide guidance relevant to the Court of Appeals decision in this case and could potentially obviate the need for this Court's plenary review." *Id.* But it is not remotely possible that *Freedom from Religion* could affect or obviate the question presented here. Again, resolving whether taxpayers may stop ongoing Executive Branch spending necessarily cannot control or inform whether they may seek restitution for terminated congressional expenditures.

Indeed, even if the cases did overlap to the extent that the *Freedom from Religion* opinion might affect the "separate and distinct" question posed here, it would be far preferable to hear both cases roughly contemporaneously in the same Term than to place this case on hold pending resolution of *Freedom from Religion*. Any discussion in the *Freedom from Religion* opinion that could affect the outcome here would necessarily be *dicta* that is quite divorced from the facts. The more prudent and appropriate course would be to resolve the question of taxpayer standing to seek restitution in a case, such as this, which squarely presents that issue in a "factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian*

Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); *see also, e.g., Burton v. United States*, 196 U.S. 283, 295 (1905) (court should not decide constitutional questions unless "absolutely necessary to a decision of the case."); Fed. Resp. Br. at 16.

2. Even if viewed without reference to the pending *Freedom from Religion* decision, the opinion below plainly merits plenary review because it squarely conflicts with the Court's bedrock justiciability precedents and because it will significantly change the scope of litigation and remedies in Religion Clause cases.

As the Petition showed, this Court's precedent establishes that taxpayers have no standing to seek financial compensation for the Treasury from an innocent third party to "remedy" the Government's own constitutional violation. In such a lawsuit, there is no cognizable fiscal injury to the taxpayers, *see Frothingham v. Mellon*, 262 U.S. 447, 487 (1923), there is no possible redress to the taxpayers, *see Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 105 (1998), and there is no adversity against the Government which supposedly committed the violation, *see Muskrat v. United States*, 219 U.S. 346, 361 (1911). *See* Fed. Resp. Br. at 12-13. The court's decision also violates separation-of-powers principles by granting taxpayers and courts veto authority over the Government's enforcement and fiscal determinations. *See United States v. Standard Oil Co.*, 332 U.S. 301, 314-15 (1947); Fed. Resp. Br. at 14-15.

The Seventh Circuit's opinion also jeopardizes the financial well-being of the private organizations that perform many essential social services, while placing these organizations in the crosshairs in the well-funded arena of Establishment Clause litigation. The threat of financial ruin alone, oftentimes, will be sufficiently daunting for the organization to cede to taxpayer demands—even if the Government is in full compliance with the Constitution. And, because the taxpayers' claims are never moribund (the money in this case was already fully spent over two years

ago), the uncertain future liability will present too much risk for many organizations to accept government funding. Indeed, taxpayers can sit idly by while an organization unknowingly digs itself into financial ruin by accepting government money only to spring forward years later and demand repayment on behalf of the Government.

It is simply not true, as Plaintiffs contend, that "no religious institution that plans to use government money in a lawful manner need fear an order of restitution of those funds." Opp. Br. at 17. The private organizations themselves cannot violate the Establishment Clause, and they cannot, and cannot be expected to, guarantee the Government's compliance with the Constitution, particularly in a murky area such as the Establishment Clause. *See Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 2869 (2005) (Breyer, J., concurring in judgment) (in Establishment Clause disputes, "no exact formula can dictate a resolution . . . ."). Here, for example, Plaintiffs allege that the Constitution is violated simply because the *Government* failed to sufficiently *monitor* its funds, even if Notre Dame and the partnering institutions never spent a dime on any religious activity and even though the Government here audited Notre Dame and found no indication that it had failed to comply with the grant terms or otherwise misused federal funds.

Notre Dame is not voicing merely hypothetical concerns about possible future slippery slopes. Based on the Seventh Circuit's reasoning, religious institutions doing good work in the public interest are *now* being threatened with oppressive orders to pay the Government money they do not have. A district court in Iowa has already ordered a religious organization to pay the Government $1.5 million for providing prerelease rehabilitation services to prisoners on behalf of the State of Iowa in violation of the Establishment Clause. *See, e.g., Ams. United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 938 (S.D. Iowa 2006). In another pending lawsuit in federal

district court, *Pedreira v. Kentucky Baptist Homes for Children*, No. 00-210 (W.D. Ky. filed April 17, 2000), the taxpayer plaintiff is seeking to recoup $30 to $100 million from a religious organization that has used government and private funds to run, among other services, an orphanage in Kentucky for the last 137 years. *See* Brief for The Thomas More Law Center as *Amicus Curiae* Supporting Petitioner, at 4.

These religious organizations are not banks and do not invest the money they receive from the Government. Rather, these organizations *use* the government money to provide social welfare services such as counseling and treatment centers. The "public funds" that the taxpayers seek to recoup were spent long ago in providing these services. If an organization is ordered to "re-pay" the Government, that money has to come from cuts in the other services it currently is providing, and, if the award is large enough, the organization will cease to exist. This decision therefore represents a serious immediate threat to innumerable private organizations that are serving the public interest.

B. Plaintiffs Provide No Reason To Deny Certiorari.

Plaintiffs' Brief in Opposition does not suggest a vehicle problem, does not refute the merits of the Petitioner's arguments, and does not otherwise present any reason to deny certiorari.

1. Plaintiffs' primary argument against review is that the appeal is interlocutory and that therefore there are "too many potential variables" like "the issue of the appropriateness of the remedy of restitution." Opp. Br. at 5. This argument is beside the point. This dispute concerns the proper scope of a federal court's Article III jurisdiction. As this Court has held, "[t]he requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Steel Co.*, 523 U.S. at 94-

95 (internal quotation marks omitted). The decision below has *finally* adjudicated that threshold jurisdictional and standing issue; no "variables" remain as to that question.

Review is therefore warranted because this Court has routinely granted certiorari when jurisdictional issues are presented in an interlocutory posture. As the Court has noted, "the judgment of the Court of Appeals was not a final one, but we considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.'" *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945)); *see also Land v. Dollar*, 330 U.S. 731, 734 & n.2 (1947) ("Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue fundamental to the further conduct of the case.") (internal quotation marks omitted). Questions of standing unsurprisingly thus often are addressed by this Court on interlocutory review. *See, e.g.*, *Steel Co.*, 523 U.S. 83; *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Valley Forge*, 454 U.S. 464. Indeed, *Freedom from Religion* is in *exactly* the same procedural posture as this case. *See Freedom from Religion*, 433 F.3d at 997 (vacating judgment of dismissal and remanding case for determination of the merits).

2. Plaintiffs also contend that no lower court has directly rejected the Seventh Circuit's new-fangled remedy because the cases applying a different mootness analysis involved challenges to discontinued "government *practices*," rather than challenges to discontinued "financial aid." Opp. Br. at 11 (emphasis in original). This argument bears little consideration as the Seventh Circuit, because of the nature of taxpayer standing, threatens to become the universal destination for taxpayer actions. Moreover, the holding below is at odds with the results in those other Establishment Clause cases because it plainly authorizes challenges to prior religious *practices*, in the same way that it authorizes challenges to terminated religious funding. This is so

because virtually all government-sponsored religious practices, such as the legislative prayer in *Hinrichs*, entail *some* expenditure of public funds.

Indeed, the conflict among the lower courts here is, if anything, more obvious than it was in *Freedom from Religion*. As the grant in that case reflects, the Court's general practice is to review unusually broad and novel rules for taxpayer standing, such as those set forth in *Valley Forge* and *DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854, 1868 (2006), *before* they wreak havoc in lower courts.

3. Plaintiffs never directly refute any of Notre Dame's arguments or discuss this Court's justiciability precedent. Plaintiffs, instead, conclusorily rely on *Flast* and dismiss every other opinion of this Court as "simply not helpful." Opp. Br. at 7 n.4. But Plaintiffs, like the court below, fail to recognize that they "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). Plaintiffs' standing to seek recoupment on behalf of the Government cannot be bootstrapped to their standing to seek a *Flast*-type injunction against ongoing congressional expenditures. *See Cuno*, 126 S. Ct. at 1868. Nor is there any other basis for finding such standing.

a. The injury in *Flast* was the use of tax dollars in aid of religion and "an injunction against the spending would of course redress *that* [religious] injury." *Id.* at 1865. Plaintiffs, lacking legal support, appeal to "common sense" to argue that ordering the return of "funds to the federal treasury" also reduces the *Flast* injury because it ensures that "taxpayer money will not have been expended on the religious activity." Opp. Br. at 8, 9. But Plaintiffs' "common-sense" argument was correctly rejected by the court below, when it found that any non-monetary "injury" caused by spending money "for forbidden purposes" "*cannot* be rectified." Pet. App. 5a. Any prior religious activity cannot be cured or undone by requiring Notre Dame to write a check for an amount equivalent to the federal grant. If a

Presidential candidate uses federal funds to mount his campaign, "taxpayer dollars will have been expended" to subsidize that candidate's speech, even if the candidate later returns the money because it was improperly spent in violation of federal election laws. The subsequent reimbursement will cure only the Treasury's financial injury; it will not somehow "undo" the speech improperly purchased through public funds. This is particularly true in the religious context because, in most cases, the alleged religious activity would not have taken place but for the government grant. That money was spent and the "recouped" funds must come from another source, likely a cut in a current program.

The remedy is particularly inappropriate here because *Notre Dame*'s expenditure did not sponsor any religious indoctrination. Notre Dame passed the bulk of the federal funds to partnering institutions, and its only alleged sin is "fail[ing] to *monitor the partners* to ensure the federal grant money was not used" for religion. Opp. Br. at 15 n.18 (emphasis added). The payment of money by Notre Dame tomorrow cannot "cure" the religious injury caused yesterday by another institution's allegedly publicly-sponsored indoctrination.

Finally, as Notre Dame explained in its Petition—and not disputed by Plaintiffs—no Establishment Clause case would *ever* be moot if the court of appeals' decision stands. If the specter of improper "sponsorship" remains notwithstanding that the activity itself has concluded, taxpayers could challenge expenditures made by the First Congress, a high school benediction prayer that occurred decades ago, or a nativity scene that is no longer displayed in the town square. Such reasoning would work a sea change in constitutional litigation.

b. Plaintiffs admit, as they must, that their asserted interest is "to protect the federal treasury from the loss of taxpayer money." *See* Opp. Br. at 8 n.7. But this Court, in a variety of contexts, including Establishment Clause cases, has rejected the proposition that a taxpayer has a legally

cognizable financial interest in the Treasury. *See, e.g.*, *Valley Forge*, 454 U.S. at 485 n.20 (rejecting the assertion that, under the Establishment Clause, "the standing of a taxpayer is established by his continuing stake . . . in the disposition of the Treasury to which he has contributed his taxes"). Nor do Plaintiffs even attempt to explain how taxpayers may have a financial interest in the Treasury in Establishment Clause cases and not in any other instance. *See* Pet. at 29-30. Thus, as Notre Dame explained in its Petition, if *Flast* truly were based on taxpayers having a financial interest in the Treasury, as Plaintiffs suggest, it is irreconcilable with this Court's more recent precedent and should be reconsidered.[3]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] Plaintiffs contend that they still have a live controversy with the Government "because the Government willfully refuses to remedy its own Establishment Clause violation" by seeking monetary "compensation" from Notre Dame. Opp. Br. at 10. But the remedy sought *against* the Government for failure to take this self-help—*i.e.*, an injunction requiring it to seek compensation from Notre Dame—was properly rejected by the Seventh Circuit, and Plaintiffs have not sought review of that now-final determination. Accordingly, Plaintiffs do not have any remedy against the Government for its prior alleged violation. And Plaintiffs do not dispute the black-letter law establishing that there is no live case or controversy between parties if no remedy is sought or available for prior conduct. *See* Pet. at 18-19. Thus, since it is now law of the case that there is no remedy against the Government, there is simply no case or controversy between Plaintiffs and the Government.

Respectfully submitted,

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December 18, 2006

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

July 26, 2006

BEFORE

HON. JOEL M. FLAUM, *CHIEF JUDGE*
HON. RICHARD A. POSNER, *CIRCUIT JUDGE*
HON. FRANK H. EASTERBROOK, *CIRCUIT JUDGE*
HON. KENNETH F. RIPPLE, *CIRCUIT JUDGE*
HON. DANIEL A. MANION, *CIRCUIT JUDGE*
HON. MICHAEL S. KANNE, *CIRCUIT JUDGE*
HON. ILANA DIAMOND ROVNER, *CIRCUIT JUDGE*
HON. DIANE P. WOOD, *CIRCUIT JUDGE*
HON. TERENCE T. EVANS, *CIRCUIT JUDGE*
HON. ANN CLAIRE WILLIAMS, *CIRCUIT JUDGE*
HON. DIANE S. SYKES, *CIRCUIT JUDGE*

NO. 05-2749

JOAN LASKOWSKI and DANIEL M. COOK,

Plaintiffs-Appellants,

v.

MARGARET SPELLINGS, in her official capacity as Secretary of the United States, Department of Education,

Defendant-Appellee,

and

UNIVERSITY OF NOTRE DAME,

Defendant-Intervenor-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 03 C 1810—**Larry J. McKinney**, *Chief Judge*.

ORDER

On May 26, 2006 and May 30, 2006, appellees, University of Notre Dame, and Margaret Spellings, Secretary of the United States Department of Education, filed petitions for rehearing with suggestion for rehearing *en banc*. The panel voted to deny rehearing, Judge Sykes dissenting, but to issue the attached supplemental opinion, from which Judge Sykes also dissents.

A vote of the active members of the court on whether to grant rehearing *en banc* was requested, and a majority of the judges have voted to deny the petitions.** The petitions are therefore DENIED.

** Judges Manion, Kanne, and Sykes voted to grant the petitions for rehearing *en banc*. Judges Ripple and Williams took no part in the consideration or decisions of the petition.

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(8)

No. 06-582

IN THE

Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME,

Petitioner,

v.

JOAN LASKOWSKI, ET AL.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is a not-for-profit legal and educational organization dedicated to, *inter alia*, the defense of religious liberty. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici.

ACLJ attorneys frequently contend with arguments based upon misreadings of the Establishment Clause of the First Amendment. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (rejecting invocation of Establishment Clause as justification for viewpoint-based discrimination against private religious speech). The ACLJ is concerned that lower courts' lax treatment of Article III standing requirements in Establishment Clause cases facilitates the use of that clause as a sword against legitimate government programs or actions with faith-based elements. *See, e.g., American Jewish Congress v. Corporation for National and Community Service*, 399 F.3d 351 (D.C. Cir. 2005) (rejecting federal taxpayer Establishment Clause challenge to AmeriCorps Education Awards Program), *cert. denied*, 126 S. Ct. 1132 (2006); *Christie v. United States*, 31 Fed. Appx. 571 (9th Cir. 2002) (rejecting federal taxpayer Establishment Clause challenge to tax exemptions for religious organizations and to National Motto), *cert. denied*, 538 U.S. 946 (2003); *Children's Healthcare Is a Legal Duty, Inc. v. DeParle*, 212 F.3d 1084 (8th Cir. 2000) (rejecting federal taxpayer Establishment Clause challenge to provisions of Balanced Budget Act of 1997 accommodating religious objections of Medicare and Medicaid

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[1] The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

recipients), *cert. denied*, 532 U.S. 957 (2001); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991) (rejecting federal taxpayer Establishment Clause challenge to certain remedial services to low income students under Title I of Education Consolidation and Improvement Act of 1981); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) (rejecting federal taxpayer Establishment Clause challenge to National Motto on money and on official documents).

Moreover, Establishment Clause suits have sometimes sought to restrict, not just government expressions with religious significance, but even the *allowance* by government of *private* religious expression. *See, e.g., Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), *vacated*, 530 U.S. 1256 (2000), *reinstated on remand, Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001) (overturning portion of injunction, issued in Establishment Clause suit, forbidding school officials from *allowing* certain student religious speech).

The ACLJ therefore strongly believes in the need for this Court to police the proper boundaries of Article III standing in Establishment Clause litigation. Whereas the Seventh Circuit in this case dramatically expanded such standing, the ACLJ files this brief urging review.

SUMMARY OF ARGUMENT

The only aspect of this case that the Seventh Circuit perceived as not being moot was the prospect that respondents might seek an order compelling restitution, from petitioner University of Notre Dame to the federal government, of funds allegedly disbursed in violation of the Establishment Clause. However, respondents plainly lack Article III standing to seek such relief. An order requiring some defendants to reimburse other defendants, with *no* reimbursement to the plaintiff, does not satisfy the redressability requirement of Article III. *Steel Co.*

v. Citizens for a Better Environment, 523 U.S. 83 (1998). Hence, this Court should grant review to repudiate the Seventh Circuit's novel and startling extension of Establishment Clause standing.

In addition, given that *Flast v. Cohen*, 392 U.S. 83 (1968), represents the ultimate predicate for respondents' claim of standing, and given that developments in this Court's Article III standing jurisprudence have left *Flast* as an isolated aberration, this Court should grant review to reconsider *Flast*.

ARGUMENT

This Court should grant certiorari and reverse the judgment below. The present brief focuses upon two points.

First, the decision below rests upon the erroneous premise that respondents have standing to seek an order compelling petitioner Notre Dame to repay, to the U.S. Department of the Treasury, funds which Notre Dame received -- and spent -- pursuant to federal contracts. As demonstrated *infra* § I, respondents lack standing to seek such relief.

Second, to the extent the Seventh Circuit's ruling purports to find shelter under *Flast v. Cohen*, 392 U.S. 83 (1968), this case provides an opportunity to revisit -- or clarify -- the exception *Flast* created to normal standing rules. *See infra* § II.

I. RESPONDENTS LACK ARTICLE III STANDING TO SEEK RESTITUTION FROM A THIRD PARTY TO THE FEDERAL GOVERNMENT.

Certainly a governmental payor -- here, the United States -- would have standing to seek recoupment of funds which the recipient allegedly obtained illegally. Here, however, the government seeks no such recoupment. Likewise, private parties can in some circumstances seek recoupment, from other private parties, of fraudulently obtained government funds, pursuant to the federal qui tam statute. *See* False Claims Act, 31 U.S.C. §§

3729-33. In such qui tam cases the plaintiff has standing, not in his own right, but as assignee of the government's claim. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771-78 (2000). Here, however, respondents do not sue under any qui tam statute, and the United States has not assigned any such claim to respondents. Thus, respondents cannot piggyback their standing upon any hypothetical governmental claim. Rather, respondents must themselves demonstrate standing. They have failed to do so.

To bring a claim in federal court, a plaintiff must satisfy the "irreducible constitutional minimum" of standing, namely, by demonstrating the following three elements:

(1) an "injury in fact" that is "concrete" and "actual or imminent";

(2) a "fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant"; and,

(3) "redressability -- a substantial likelihood that the requested relief will remedy the alleged injury in fact."

Vermont Agency, 529 U.S. at 771 (internal quotation marks, editing marks, and citations omitted).

A plaintiff bears the burden of establishing Article III standing. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006). Indeed, "we presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *id.* (internal quotation marks and citation omitted). Moreover, "a plaintiff must demonstrate standing separately *for each form of relief sought*." *Id.* at 1867 (emphasis added; internal quotation marks and citation omitted). Hence, even assuming *arguendo* that respondents would have standing to challenge and halt

allegedly unconstitutional federal expenditures, this does not mean that respondents have standing to seek restitution of funds already disbursed. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Here, as explained below, redressability is clearly lacking.

The remedy of restitution, paid from petitioner Notre Dame to the United States Treasury, obviously yields no money to respondents. Such payments "might be viewed as a sort of compensation to respondent[s] if they were payable to respondent[s]. But they are not." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106 (1998) (holding plaintiff lacked standing). As in *Steel Company*, each respondent in this case seeks "not remediation of its own injury -- reimbursement for the costs it incurred . . . -- but vindication of the rule of law -- the undifferentiated public interest in faithful execution of" Establishment Clause limitations. *Id.* (internal quotation marks and citations omitted). "This does not suffice." *Id.*[2]

In short, a restitution order would direct no money from Notre Dame to the respondents, and thus respondents fail the redressability requirement for standing to seek such relief.

Thus, this Court's case law -- and especially *Steel Company* -- make it crystal clear that respondents in this case lack Article

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[2] This Court made clear in *Steel Company* that standing likewise cannot rest upon the fact that a plaintiff "will be gratified by seeing [a defendant] punished for its infraction and that the punishment will deter the risk of future harm." *Id.* at 106-07. As this Court explained, to accept such reasoning "would make the redressibility requirement vanish." *Id.* at 107. With respect to the plaintiff's gratification, "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Id.* As for deterrence, every adverse ruling will deter a defendant. A "generalized interest in deterrence . . . is insufficient for purposes of Article III." *Id.* at 108-09.

The *Steel Company* Court also held that the mere prospect of an award of costs and attorney fees cannot generate standing. *Id.* at 107-08.

III standing to seek restitution from one set of defendants to another. Hence, this Court should grant review, reverse the decision below, and remand with directions to dismiss.

II. THE UNDERPINNINGS OF *FLAST v. COHEN* HAVE BEEN SUFFICIENTLY UNDERMINED AS TO WARRANT ITS RECONSIDERATION.

Respondents' alleged standing in this case rests upon their status as federal taxpayers. This case therefore presents an opportunity to reexamine the sufficiency of taxpayer standing in Establishment Clause cases.

The general rule is that being a taxpayer does *not* by itself suffice to confer Article III standing to challenge federal government actions. *Frothingham v. Mellon*, 262 U.S. 447 (1923). However, in *Flast v. Cohen*, 392 U.S. 83 (1968), this Court created a limited exception for certain claims brought under the Establishment Clause.

As discussed below, this Court's refinement of the doctrine of standing in the years subsequent to *Flast* has completely undermined the rationale for that decision and left *Flast* as an isolated departure from otherwise uniform case law. The time is therefore ripe to reconsider the vitality of *Flast*.

A. *Flast* Stands Alone as an Exception to the General Rule that Being a Taxpayer is Insufficient for Article III Standing.

In *Frothingham*, this Court ruled that federal taxpayer status is insufficient to confer standing to challenge government action. While *Flast* subsequently opened up an exception for certain Establishment Clause claims, this Court has countenanced no other exception to the rule of *Frothingham*. On the contrary, this Court has *rejected* such pleas of federal taxpayer standing. *See United States v. Richardson*, 418 U.S. 166 (1974) (no taxpayer

standing to sue under Statement and Account Clause); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (no taxpayer standing to sue under Incompatibility Clause); *DaimlerChrysler*, 126 S. Ct. at 1864-65 (no taxpayer standing to sue under Commerce Clause). Even in the context of Establishment Clause claims, this Court has refused to expand *Flast* beyond the contours of that case. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (no federal taxpayer standing to bring Establishment Clause challenge to exercise of power under Property Clause, as opposed to Taxing and Spending Clause).

In short, *Flast* stands quite alone.[3]

B. The *Flast* Rule is Illogical on Its Own Terms.

The *Flast* decision is not even logically coherent.

The *Flast* Court declared that it would recognize an exception to *Frothingham* when taxpayers could demonstrate "the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements." *Flast*, 392 U.S. at 102.

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that statute and the precise

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[3] To be sure, this Court followed "*Flast* and the narrow exception it created" in *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988). But that case turned on the *scope* of this "narrow exception," and not on its defensibility. *See* 487 U.S. at 618-20.

> nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

392 U.S. at 102-03.

But as Justice Harlan pointed out in dissent, the two-part test set forth in *Flast* is "not in any sense a measurement of any plaintiff's interest in the outcome of any suit." *Id.* at 122 (Harlan, J. dissenting). As Justice Harlan explained regarding the first prong of the *Flast* test -- the requirement that the attack be upon a direct expenditure, not just an incidental outlay -- "it surely cannot matter to the taxpayer *qua* taxpayer whether an unconstitutional expenditure is used to hire the services of regulatory personnel or is distributed . . . as grants-in-aid." *Id.* at 123. The taxpayer's "interest as taxpayer arises, if at all, from the fact of an unlawful expenditure, and not as a consequence of the expenditure's form." *Id.* Justice Harlan perceived the second *Flast* prong -- the requirement that the claim arise under a specific limitation on the spending power -- as "similarly irrelevant." *Id.* "The intensity of a plaintiff's interest in a suit is not measured, even obliquely, by the fact that the constitutional provision under which he claims is, or is not, a 'specific limitation' upon Congress' spending powers." *Id.* As Justice Harlan noted, a plaintiff's interest in the suit does not "vary according to the constitutional provision under which he states his claim." *Id.* at 124.

In sum, *Flast*'s rule does not even follow from its own premises. Furthermore, as demonstrated below, even those premises have failed the test of time.

C. This Court Has Rebutted Each of the Arguments the *Flast* Court Relied Upon to Confer Standing.

In addition to its internal incoherence, the premises the *Flast* opinion offered in support of its exception to the usual standing doctrine have been thoroughly undermined by this Court's later decisions, leaving *Flast* with no legs to stand on.

1. Confusion over constitutional requirements

The *Flast* Court, while acknowledging the *Frothingham* rule against taxpayer standing, professed "confusion" over the difference between the strict requirements of Article III and merely prudential "policy considerations" governing limitations on standing, *Flast*, 392 U.S. at 92-94. *Cf. also id.* at 95-97 (finding uncertainty in meaning and scope of doctrine of justiciability in general); *id.* at 98-99 (describing standing doctrine as complex and vague). However, this Court has subsequently clarified beyond all doubt that the injury in fact, traceability, and redressability elements of standing form an "irreducible constitutional minimum." *E.g.*, *Vermont Agency*, 529 U.S. at 771; *Steel Co.*, 523 U.S. at 102-03.

Thus, it is no mere matter of policy choices, but rather a lethal constitutional flaw, that a federal taxpayer lacks a concrete personal injury (as opposed to the same undifferentiated "injury" all citizens and taxpayers suffer from illegal government action), traceability (federal tax funds being emptied into a general treasury from which appropriations are drawn), and redressability (since a successful suit would yield neither a tax refund nor any real likelihood of a reduction in the taxpayer's tax bills).

2. Reliance on hypothetical worst cases

The *Flast* Court expressed concern that if taxpayers did not *ipso facto* have standing to bring Establishment Clause claims,

then taxpayers could not sue "even if Congress engaged in such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects." 392 U.S. at 98 n.17. But this Court has since held that such a concern is legally irrelevant.

The hypothetical downside of a lack of taxpayer standing is by no means unique to Establishment Clause claims. Little imagination is needed to conjure up nightmarish hypothetical violations of the Statement and Account Clause and the Incompatibility Clause, for example, yet there is no taxpayer standing to challenge such violations, *see Richardson; Schlesinger*. One could likewise theorize infringements of a host of other constitutional provisions, such as the Title of Nobility Clause (U.S. Const. Art. I, § 9, cl. 8), for which a taxpayer lawsuit might be the only realistic means of bringing the violations to court. But "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger*, 418 U.S. at 227. *Accord Valley Forge*, 454 U.S. at 489 (quoting same language in denying standing to bring Establishment Clause claim). "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Richardson*, 418 U.S. at 179.

Moreover, worst case scenarios have a way of generating political consequences. As this Court observed in *Richardson*, "[s]low, cumbersome, and unresponsive" as that system "may be thought at times," "the political forum" and "the polls" remain available for the pursuit of redress. *Id.*

3. Disregard of separation of powers concerns

The *Flast* Court opined that the question of standing to sue

"does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated." 392 U.S. at 100-01.

That proposition is no longer tenable. As this Court has repeatedly held, the standing requirements of Article III play a vital role in maintaining the proper separation of powers between the Congress, the Executive, and the Judiciary. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992); *Lewis*, 518 U.S. at 349. "The . . . constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers." *Steel Co.*, 523 U.S. at 101. Indeed, this Court has already expressly declared that "*Flast* erred" when it "failed to recognize that this doctrine has a separation-of-powers component . . . ." *Lewis*, 518 U.S. at 353 n.3.

4. Conferring unique status on Establishment Clause claims

The *Flast* Court perceived significance in its view that "one of the specific evils" feared by the drafters of the Establishment Clause "was that the taxing and spending power would be used to favor one religion over another." 392 U.S. at 103. This observation, however, goes to the scope of the Establishment Clause *on the merits*, not to the availability of taxpayers standing. As the Court has since observed, "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576-77. And as *Valley Forge* held, litigants' "claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487 (footnote omitted).

More recently, in *DaimlerChrysler v. Cuno*, 126 S. Ct. 1854 (2006), this Court distinguished *Flast* and referred to its "narrow application in our precedent," 126 S. Ct. at 1865. This Court described *Flast* as having "understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extraction and spending' of 'tax money' in aid of religion . . . ." 126 S. Ct. at 1865. *See Flast*, 392 U.S. at 106. While *Flast's* description of the relevant injury served to distinguish the case from *DaimlerChrysler*, it underscores *Flast's* incompatibility with this Court's standing cases. For while *Flast's* redefinition of the "injury" may suffice to clear the *redressability* hurdle ("an injunction against the spending would of course redress *that* injury," *DaimlerChrysler*, 126 S. Ct. at 1865) (emphasis in original), the injury as defined in *Flast* clearly fails the Article III requirements for a cognizable *injury*. Such an injury is insufficient because that injury "is shared with all members of the public." *Richardson*, 418 U.S. at 178 (internal quotation marks and citation omitted). *Accord Lujan*, 504 U.S. at 573-74 ("generally available grievance about government" is insufficient for standing); *Valley Forge*, 454 U.S. at 483 ("assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning").

* * *

In sum, this Court has, in the years since *Flast*, knocked out every single rationale underpinning that decision. Like Wile E. Coyote in the old Roadrunner cartoons, *Flast* stands in midair, waiting only for that fact to be noticed before collapsing of its own weight.

This case provides an opportune vehicle for reconsidering *Flast* and restoring uniformity to the doctrine of standing.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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No. 06-582

IN THE

Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME,

Petitioner,

v.

JOAN LASKOWSKI, ET AL.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Christian Legal Society (the Society) is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. The Society's legal advocacy and information division, the Center for Law & Religious Freedom (the Center), works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center strives to preserve religious freedom in order that men and women might be free to do God's will, and because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

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* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ARGUMENT

Amicus joins Petitioner, the University of Notre Dame, Defendant-Intervenor below, in urging the Supreme Court of the United States to grant the University's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. However, *Amicus'* reasons for supporting the petition are, in several respects, different from those of the University.

Understanding *Flast v. Cohen*, 392 U.S. 83 (1968), and its holding with respect to taxpayer standing first requires understanding the nature of the Establishment Clause. *Flast*'s double-nexus test[1] has never been satisfied outside the Establishment Clause context.[2] There is a good reason for that development, one with which *Amicus* agrees.

A. The Nature of the Establishment Clause.

The Establishment Clause is structural in character. Or, more precisely, since the mid-20th Century it has come to be regarded as such by this Court. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998). As such, the no-establishment principle is about the separation of

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[1] 392 U.S. at 102.

[2] For example, this Court has twice rejected taxpayer claims brought under the Free Exercise Clause. *See Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (taxpayers lacked the requisite burden on religion); *Board of Education v. Allen*, 392 U.S. 236, 248-49 (1968) (same). The determinations in *Tilton* and *Allen* were sound.

church and state or, more specifically, the clause is about properly ordering relations between church and state.

The work of the modern Establishment Clause is thus to keep in proper relationship two centers of authority, government and organized religion. That development ought to come as little surprise because the dual-authority pattern of state and church[3] has been part of the Western legal tradition since the Fourth Century.[4] American jurisprudence, standing as it does in the stream of Western civilization, could not help but have as a presupposition of its fundamental laws an ordering of relations between church and state.[5]

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[3] JOHN F. WILSON & DONALD L. DRAKEMAN, CHURCH AND STATE IN AMERICAN HISTORY 1-10 (3d ed. 2003). "So there were two, Priest and prince, or church and state, each needed the other, but both were separate aspects of one society. This separated double authority structure is what marked off Western Christendom from Eastern Christianity, and it properly locates the significance of 'church and state.'" *Id.* at 3-4.

[4] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445, 445-53 (2002); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1391-94, 1576-92 (2004).

[5] Lecturing on comparative law, Roscoe Pound, then Dean at Harvard Law School, was identifying those received precepts, those assumed starting points, those presuppositions from which Western law unconsciously draws. One such fundamental principle in the West is that church and state have long been regarded as distinct centers of authority: "In the politics and law of the Middle Ages the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of temporal sovereign, that is, of a politically organized society,

To be sure, the precise location of the line between church and state has always been disputed, with the government sometimes dominating the church and the church sometimes dominating the government. But what is not contested in the Western legal tradition is that — wherever you draw that line — necessarily there are two centers of authority each with its own purview. And, in the United States, unlike with the various European models, the additional step of disestablishment was taken, essentially a deregulation of the specifically religious sphere.[6]

By structural, *Amicus* means that the task of the Establishment Clause is to police the boundary between government and organized religion. This proper ordering of church-state relations is to the

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was fundamental." Roscoe Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1, 6 (1933).

[6] Historian Jack Rakove writes:

> [James] Madison and [Thomas] Jefferson were not mere tolerationists; they countenanced a constitutional solution to the religion question, renouncing the authority of the state to regulate the one aspect of behavior that had most disrupted the peace of society since the Reformation. For at the heart of their support for disestablishment and free exercise lay the radical conviction that nearly the entire sphere of religious practice could be safely deregulated, placed beyond the cognizance of the state, and thus defused as both a source of political strife and a danger to individual rights.

JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 311-12 (1997).

mutual benefit of both the body politic and organized religion.[7]

That the Supreme Court has regarded the Establishment Clause as ordering relations between church and state is manifest in this Court's case law in six or seven different ways. *See* Esbeck, *supra* note 4, 18 J.L. & POL. at 456-71 (relaxed standing rules; awarding of remedies for harms other than religious harm; awarding class-wide remedies, not just relief for the claimants before the court; dismissals of claims for lack of subject matter jurisdiction; two definitions of religion, one for the Free Exercise Clause and one for the Establishment Clause, reflecting the different purposes of each clause; the awarding of remedies that protect organized religion from its own harmful choices).

One of the most telling validations of the structural character of the Establishment Clause is the special standing rule in *Flast v. Cohen*. *See* Esbeck, 84 IOWA L. REV. at 33-40.

Broadly speaking, the Establishment Clause is about preventing two types of harms: (a) prohibiting the government from embracing a specifically

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[7] Statements observing such reciprocity are common in this Court's cases. *See, e.g.*, *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948) ("For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); *Watson v. Jones*, 80 U.S. (13-Wall.) 679, 730 (1871) ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.").

religious doctrine or observance that then causes division within the body politic along religious lines (often dubbed "political divisiveness along religious lines")[8]; and (b) prohibiting entanglement by the government and other intrusions into religion that cause harm to the internal freedom of religious organizations (often dubbed "church autonomy"). *See* Esbeck, 84 IOWA L. REV. at 60-63. That church-state separation is a "two-way street," that is, it is to operate to the mutual benefit of both, is seen in the *Lemon* test ("primary effect that neither advances nor inhibits religion" and "no excessive entanglement")[9] and the endorsement test (government is restrained from "communicating a

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[8] Care must be exercised so that "divisiveness avoidance" does not slop over and violate the Free Speech Clause or the right of Expressive Association. *See McDaniel v. Paty*, 435 U.S. 618, 640-42 (1978) (Brennan, J., concurring in the judgment). Public disputes over the application of religious beliefs to political issues are common in a democracy. At the time of the American founding, republics were still experimental and thought unstable. The founders knew, for example, how sectarian division caused the English Commonwealth (1649-58) to fail. They believed that for a nation-state to take sides in disputes over creeds and other specific forms of religious observance was to dangerously risk dividing the body politic. Hence, for example, religious tests for public office were bad for republics. *See* U.S. CONST. art. VI, § 3 (". . . no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."). The founders believed that specifically religious questions were never properly within the government's temporal authority. *See Watson*, 80 U.S. (13 Wall.) 679 (no civil court jurisdiction with respect to disputes over doctrine, polity, or discipline). But the focus of "divisiveness analysis" must be on the government alone and its specifically religious behavior, not on the expression of private speakers. The latter is fully protected by the Free Speech Clause.

[9] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

message of government endorsement or disapproval of religion").[10]

The University points out that the taxpayer plaintiffs have no religious harm. *Petition for Writ of Certiorari* at 9, 13, 14-15. True, but it matters not. *Flast* taxpayer standing does not require a showing of religious harm, which follows from the fact that stating a claim under the Establishment Clause does not require a showing of religious harm.[11] On numerous occasions the Establishment Clause has provided redress for individual injuries other than religious harms. *See* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311, 317-18 (2000) (economic harm or loss of property;[12] constraints on academic freedom

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[10] *See Lynch v. Donnelly*, 465 U.S. 608, 690 (1984) (O'Connor, J., concurring). The endorsement test is attributed to Justice O'Connor.

[11] This Court has long noted that religious coercion or individual harm does not always (and need not) attend a violation of the Establishment Clause. *See Abington School District v. Schempp*, 374 U.S. 203, 221 (1963) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not."); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (same). This further validates that the nature of the no-establishment restraint is structural rather than being rights-based.

[12] *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (economic harm to department store); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (economic harm to a tavern).

and inquiry by teachers and students;[13] and restraints on free-thinking atheists[14]).

When a structural provision in the Constitution is transgressed it is not uncommon for there to be no particularized "injury in fact."[15] Rather, the injury is a generalized grievance falling on a large part or all of the body politic. That the harm to a group of taxpayer-plaintiffs is generalized is unsurprising, for the Establishment Clause is structural, ordering and policing relations between the entities of government and organized religion. Hence, there will be occasions (not too uncommon) when the Establishment Clause is violated and no one suffers "injury in fact." The U.S. Supreme Court responded by adopting the double-nexus test of *Flast v. Cohen*. Had the Court not done so the judiciary would be unable to address many Establishment Clause violations.

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[13] *Edwards v. Aguillard*, 482 U.S. 578 (1987) (public school teacher and students desirous of an expand science curriculum); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (same).

[14] *Torcaso v. Watkins*, 367 U.S. 488 (1961) (ruling in favor of atheist, who by self-profession had no religion and thus no harm to his religion, but who was desirous of holding public office without taking theistic oath).

[15] This happened in both *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). A rights violation is likely to produce a victim and lead to a particularized "injury in fact." When the government transgresses a structural boundary, a generalized grievance often occurs. That said, a structural violation can sometimes lead to a particularized injury. See *supra* nn. 12-14 for examples where a violation of the Establishment Clause did cause individual harm.

It is true that only government (or a "state actor") can violate the Establishment Clause. But that truism is of limited assistance here. When the government exceeds the restraints of the Establishment Clause, a private-sector actor (either an individual or an organization) may be inappropriately benefited. Here, of course, the beneficiary is alleged to be the University. When this occurs (and Congress has not provided otherwise, see *infra*), it is an open question whether the federal judiciary has the inherent authority to fashion a remedy that seeks to return the parties to the position they would have occupied (to the extent that is reasonably possible) had the church-state boundary not been violated.[16] If the private-sector organization alleged to be inappropriately benefited is not a party to the lawsuit, in order to effect a remedy, the district court can order that the organization be made a co-defendant pursuant to Rule 19 of the Federal Rules of Civil Procedure.

The University points out that the federal government (the Department of Education) does not seek a return of the grant monies. However, so far as the Establishment Clause is concerned that is of no consequence. Although constitutional rights can

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[16] An assertion of inherent remedial authority in the federal judiciary raises a separation of powers question. *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (noting that an agency's refusal to seek a remedy for a private party "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'").

be waived, violations of constitutional structure cannot be waived. This is because the Constitution's structure (better termed the "frame of government") is there to define and preserve the republic and thereby preserve the liberties of the entire body politic.[17] Because the constitutional frame of limited and divided government, with its checks and balances, is there to safeguard the liberties of all of us, no one litigant (especially the government!) could waive it for all others comprising the body politic. This is illustrated by the line-item veto case, *Clinton v. City of New York*, 524 U.S. 417 (1998). One of the arguments by the government for the line-item veto legislation being constitutional was that Congress had enacted the statute and thus had waived its ability to later complain that the legislation wrongly shifted power to the Executive Branch. Justice Kennedy rejected the argument. He noted that there could be no waiver by Congress of the Constitution's separation of powers. That structure (or framework) is there to limit and check government, with the consequential effect of protecting the liberty of us all. *Id.* at 449-51 (Kennedy, J., concurring). In the same manner, a federal court's lack of subject matter jurisdiction is a restraint on the Judicial Branch's Article III authority that can never be waived by a party litigant. *See* Fed. R. Civ. P. 12(h)(3); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 & n.10 (1982) (contrasting the rights-based limit on personal jurisdiction as an "individual liberty" that can be waived with a structural restraint such as the limit

[17] The Constitution's framework is not only for the protection of citizens. It protects everyone, alien or citizen, who comes within the jurisdiction of the United States of America.

on subject matter jurisdiction that is a "restriction on judicial power" and thus cannot be waived).

There is therefore nothing about the fundamental nature or character of the Establishment Clause that would prohibit the remedy of recoupment in this case. *Amicus* believes, rather, that the case turns on the law of justiciability and remedies.

B. *Flast* Taxpayer Standing.

Flast taxpayer standing is a legal fiction. *See* Esbeck, 84 IOWA L. REV. at 35-36; Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 74 (1968) ("And it is a fiction that a taxpayer like Flast is asserting a personal stake or interest based on his reluctance to have his tax money expended for the purpose to which he objects."). A federal taxpayer does not have actual "injury in fact" when funds are appropriated from the U.S. Treasury in a manner that violates the Establishment Clause. Moreover, and relatedly, should the taxpayer prevail on the merits, the remedy is not a refund of a tiny part of his or her federal tax dollars.

Amicus does not characterize *Flast* taxpayer standing as a legal fiction to disparage the case. Rather, *Amicus* calls it a fiction merely as an apt description. Like all legal fictions, the fiction in *Flast* is instrumental. It is a legal fiction that a taxpayer-plaintiff has suffered an individual "harm" so as to permit adjudication of a putative transgression of the church-state boundary by the Legislative Branch that would otherwise go without review by the Judicial Branch. It is true, of course,

that Congress could have second thoughts and go back and repeal the legislation claimed to improperly involve the government with organized religion. But that is unlikely, just as it unlikely that the Executive Branch will unilaterally refuse to administer the Legislative Branch's program.

Flast taxpayer standing can be justified because the structural restraint in the no-establishment principle is *sui generis*, that is, it is unlike other constitutional structure which either runs horizontal as between the three federal branches (i.e., "separation of powers") or runs vertical as between the federal government and the governments of the several states (*i.e.*, "federalism").[18] When either separation of powers or federalism is transgressed, or arguably so, there will usually be some other governmental branch eager to defend against encroachment on its turf. Not so with church-state violations, especially those involving large sums of public monies. The religious organization receiving a grant out of general tax revenues (and the potentially entangling regulations that go along with the funding and that may compromise the faith) is not going to complain about the funding or the accompanying regulations, for the receipt of the funds was voluntary with the religious organization. Here, of course, that religious organization is the University and it neither complains about receiving

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[18] Some argue that the Second Amendment is a structural reservation of power to the States concerning Militia, hence not an individual right concerning firearms. If so, it is a structural clause of the federalism sort. Thus perhaps the Establishment Clause is not viewed as the only structural provision in the Bill of Rights.

the ear-marked monies nor about the burden of complying with the accompanying regulations. Such behavior is normal and to be expected. *See* Esbeck, 84 IOWA L. REV. at 39-40, 62-63. Hence, the legal fiction has its utility.

Flast taxpayer standing requires more than a showing that the plaintiff is a federal taxpayer. *Flast* requires spending by Congress under its Article I, Section 8, Clause 1, Taxing and Spending Power. There have been those who have argued for adopting a far broader legal fiction, namely citizen standing, so long as the underlying claim involves the Establishment Clause.[19]

While *Amicus* urges that *Flast v. Cohen* be reaffirmed, it does not urge that the scope of *Flast* be expanded. *Flast* has shown itself to be workable. It has not led to a vexatious number of lawsuits. It has not led to the Judicial Branch trenching into the authority reserved to the Legislative Branch.

Amicus agrees with the dissent by Judge Ripple in *Freedom From Religion Foundation v. Chao*, 433 F.3d 989, 997 (7th Cir. 2006) (Ripple, J., dissenting), *petition for cert. filed*, 75 U.S.L.W. 3065 (Aug. 1, 2006) (No. 06-157), where he states that *Flast* by its terms is limited to instances where congressional appropriations are made (or grants are awarded) to private-sector parties.[20] *Flast* taxpayer standing

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[19] *See, e.g., Flast*, 392 U.S. at 115-16 (Fortas, J., concurring) (stating that citizen standing would do).

[20] *Flast* was applied in *Americans United for Separation of Church and State v. Valley Forge Christian College*, 454 U.S.

should not be extended to situations where congressionally authorized discretionary spending is performed by agencies or officers of the Executive Branch—said to be done in a manner that violates the Establishment Clause.[21] It can be plausibly argued that everything said or done by an officer or agency of the Executive Branch is made possible only by the expenditure of taxpayer monies. If all such Executive Branch actions were reviewable by the Judicial Branch with an eye to church-state transgressions, that would hazard the Article III Branch superintending the day to day work of the Article II Branch. As stated above, *Flast* taxpayer standing is instrumental. *Flast* sought to do more good than harm. But if all Executive Branch utterances and actions are reviewable in a search for church-state boundary violations—and that at the behest of a private-sector taxpayer—then we would have a clear case of doing more harm than good.

There will be those who argue that any alleged structural violation of the no-establishment restraint should be justiciable in an Article III court. If *Flast* had gone that far, then anyone and everyone, citizen or resident alien, would have standing to bring an Establishment Clause claim of any character. The Court in *Flast* did not go that far; nor should it. The double-nexus test of *Flast* was designed to set limits on taxpayer standing that ensure the requisite clash of interests that makes the adversarial process work.

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464 (1982), and *Bowen v. Kendrick*, 487 U.S. 589 (1988), but not expanded.

[21] Because of the absence of *Flast* standing in that case, *Amicus* urges this Court to grant a writ of certiorari and reverse in *Chao*, 433 F.3d 989.

The double-nexus test was the prudential stopping point to taxpayer standing. To expand the scope of taxpayer standing beyond *Flast* is to risk violating separation of powers with the Judicial Branch transgressing on the prerogatives reserved to the Executive Branch. That would be a little like destroying the village in order to save it.

C. Recoupment and Deference to Coordinate Branches.

Amicus agrees with that part of both the majority and dissenting opinions below that observe that congressional legislation, as well as regulations, already provide for a collection of amounts due with respect to a misspent grant. And pursuing such a remedy is in the sole discretion of the Secretary of Education. *Laskowski v. Spellings*, 443 F.3d 930, 934 (7th Cir. 2006) (Posner, J., for the panel majority); *id.* at 940 (Sykes, J., dissenting). Both opinions agree on this point and cite 31 U.S.C. §§ 3701(b)(1)(C) and 3711(a)(1), and 34 C.F.R. §§ 74.73(a) and 75.532. Hence, taxpayer plaintiffs may not avail themselves of the remedy that Congress and the Department of Education's regulations provide. Limited statutory remedies for constitutional violations are exclusive, and thus negate an implied private cause of action. *See Schweiker v. Chilicky*, 487 U.S. 412 (1988) (refusing to imply private remedy for damages arising out of denial of disability benefits alleged to be in violation of due process rights); *Bush v. Lucas*, 462 U.S. 367 (1983) (refusing to imply private remedy for damages arising out of alleged denial of free speech rights in employment relationship where there are

in place comprehensive procedural and substantive provisions).[22] Not implying a private cause of action for recoupment is especially compelling on these facts: Injunctive relief will fix any problem going forward, and the taxpayer plaintiffs have no actual damages because they have no injury in fact.[23]

As *Amicus* stated above, it is an open question whether it is within the inherent authority of the federal judiciary to seek to return (to the degree reasonably possible) the parties to the position they would have occupied had the church-state boundary not been breached. However, this inherent authority does not operate in a vacuum. Congress and executive-level administrative bodies have not been silent but have provided a limited remedy for the collection of appropriations thought to have been misspent. Such a remedy is vested in the sole discretion of the Secretary of Education. In such circumstances, the judiciary defers to the remedy designed by the coordinate branches. To permit

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[22] Consider also cases where Congress had created a remedy for damages and the Court refused to imply a right to contribution between co-defendants. *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981) (Title VII); *Texas Industries v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (Sherman Act). The relevance is that contribution, like the recoupment sought here, is a restitutionary remedy. *See* 1 GEORGE PALMER, LAW OF RESTITUTION §1.5 at 29-33 (1978); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 710-12 (3d ed. 2002).

[23] To imply a private cause of action for recoupment is also unfair to the University. Participation in Spending Clause programs is voluntary, and participants are entitled to notice of what their obligations and liabilities are before they agree to accept the federal money. The University had no such notice here.

collection of amounts due because of misspent grant funds by any name—call it recoupment, reimbursement, refund, repayment, or restitution—would be a circumvention of the combined congressional and executive decision to vest the remedy for the collection of misspent grant funds in the sole discretion of the Secretary.

There is any number of good reasons why the coordinate branches might place with the Secretary the sole discretion to seek recoupment or its equivalent. For example, it is in the interest of the Department of Education for faith-based organizations, along with all other private-sector educational and social-service providers, to not be afraid to apply for grants and participate in federal educational programs. Thus, for the Secretary to seek recoupment may "chill" the laudable aim of equal treatment without regard to religion.[24] Not seeking recoupment may, in the judgment of the Secretary, strike the right balance between a deterrence of unconstitutional action, on the one hand, and the "chilling" of faith-based provider participation in educational grant programs, on the other hand. Or the Secretary might determine, after considering all the facts before her, that it is sufficient if the grantee returns only those federal funds not already spent on educational services. As to funds already spent, the Secretary may have evidence that good value was received by the intended beneficiaries of the educational program.

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[24] *See, e.g.*, "*Participation in Education Department Programs by Religious Organizations; Providing for Equal Treatment of All Education Program Participants*," 69 Fed. Reg. 31708 (June 4, 2004) (codified at 34 C.F.R. pts. 74, 75, 76, 80).

Or the Secretary may have cause to believe that some other remedy in her arsenal is more effective, such as barring the grantee from applying for future departmental grants.

CONCLUSION

Amicus requests that this Court grant the University's petition and, following plenary review, reverse the United States Court of Appeals for the Seventh Circuit. After plenary review, *Amicus* requests that this Court hold that the *Flast* taxpayer plaintiffs here may not seek recoupment or its equivalent, whether called reimbursement, refund, repayment, restitution, or the collection of grant monies misspent. *Amicus* further requests that this Court hold that the authorization of recoupment or its equivalent would be a circumvention of the remedy provided by 31 U.S.C. §§ 3701(b)(1)(C) and 3711(a)(1), and 34 C.F.R. §§ 74.73(a) and 75.532.

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No. 06-582

IN THE

Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME,
Petitioner,

v.

JOAN LASKOWSKI, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, COLORADO, KANSAS, OHIO, SOUTH CAROLINA, TEXAS, WASHINGTON, and VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether federal taxpayers have standing under *Flast v. Cohen*, 392 U.S. 83 (1968), to seek an injunction ordering a private religious university, which was not alleged to have committed a constitutional violation, to pay the Government, the alleged constitutional violator, an amount of money equal to an expired and fully expended government grant, where the past expenditure of that grant allegedly violated the Establishment Clause and the Government does not want the money.

2. Whether *Flast v. Cohen* should be overruled if the court of appeals' novel theory of taxpayer standing is consistent with that precedent.

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Other Authorities

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Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L. J. 771 (2003) 7, 8

Office of Faith-Based & Community Initiatives, *About Us, available at* http://www.in.gov/ofbci/about/index.html (last visited Nov. 17, 2006) 2

Office of Faith-Based & Community Initiatives, *Federal & State Resources for Faith-Based Institutions, available at* http://www.in.gov/ofbci/programs/faithbased/funding_opp.html (last visited Nov. 17, 2006) 2

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INTEREST OF *AMICI CURIAE*

As set forth in the brief of Indiana and 11 other states as *amici curiae* in support of the government's petition for certiorari in *Grace v. Freedom from Religion Found., Inc.*, No. 06-157, 75 U.S.L.W. 3065 (Aug. 1, 2006), state officials are frequently sued in federal court by state taxpayers seeking to enjoin ongoing government programs on Establishment Clause grounds. Under the rule established by the decision below, however, both states and the beneficiaries of state programs will now be vulnerable to lawsuits seeking not just injunctions against ongoing programs, but orders requiring financial reimbursement of the government fisc, even for programs that have ended. States have a compelling interest in Supreme Court review of this sweeping new Establishment Clause remedy—a remedy that threatens to undermine not only states' fiscal decisions, but also their sovereignty and their ability to effectuate social policies through state-funding programs.

REASONS FOR GRANTING THE PETITION

I. Review is Warranted Because the Decision Below Exposes State Treasuries and Social-Policy Initiatives to Federal-Court Supervision and Interference

1. Like the federal government, state governments regularly administer grant programs whereby religious institutions—along with wholly secular groups—receive taxpayer funds for purposes of carrying out secular functions. At least 33 states, including Indiana, have faith-based liaisons or a state office for faith-based and community initiatives. *See* White House Office of Faith-Based & Community Initiatives, *Contact Information—State Liaisons, available at* http://www.whitehouse.gov/government/fbci/contact-states.html (last visited Nov. 17, 2006). Indiana's Office of Faith-Based and Community Initiatives,

created to ensure that faith-based institutions are provided equal access to state and federal funding, provides training, technical assistance, and grants to community-based and faith-based organizations. *See* Office of Faith-Based & Community Initiatives, *About Us, available at* http://www.in.gov/ofbci/about/index.html (last visited Nov. 17, 2006).

States need not have an office dedicated to faith-based initiatives in order to administer grant programs that might have religiously affiliated beneficiaries. For example, in Indiana, the Family and Social Services Administration administers and distributes grants from the federal Child Care Development Fund, which, among other things, provides vouchers to eligible families for child-care expenses at approved providers, including those that are affiliated with a religion. *See* Ind. Code § 12-17.2-3.5 *et seq.*; *see also, e.g., DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 401 (2d Cir. 2001) (reviewing a challenge to government support for Alcoholics Anonymous, the national alcoholism-recovery program that incorporates Christian principles).

Many states also assist or accommodate religious institutions in other ways, such as through tax exemptions and tax deductions to donors. In Indiana, for example, the Neighborhood Assistance Program of the Indiana Housing and Community Development Agency provides over $2.5 million in tax credits to non-profits in Indiana to facilitate the provision of social services. In 2005, 67 Indiana non-profit organizations received tax credits, and at least 22 of those organizations were faith-based. *See* Office of Faith-Based & Community Initiatives, *Federal & State Resources for Faith-Based Institutions, available at* http://www.in.gov/ofbci/programs/faithbased/funding_opp.html (last visited Nov. 17, 2006); *see also, e.g., Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 503 (6th Cir. 2001) (reviewing the issuance of tax-exempt revenue bonds by a public-economic-development corporation on behalf of a Roman Catholic school).

These state programs are as vulnerable to the Seventh Circuit's dramatic expansion of Establishment Clause taxpayer standing as federal programs. In *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952), the Court, presaging its decision in *Flast v. Cohen*, 392 U.S. 83, (1968), acknowledged that a state taxpayer can bring a "good-faith pocketbook action" where the government incurs at least a marginal cost owing to conduct that violates the Establishment Clause. Since *Flast*, courts have largely treated state-taxpayer standing to assert Establishment Clause violations the same as federal-taxpayer standing. *See Minn. Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1357 (8th Cir. 1989) (observing that *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947), "indicated that establishment clause limits state spending powers as well" and "the effect of *Flast* was to harmonize in some respects federal and state taxpayer standing" after *Doremus*); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 943-45 (11th Cir. 2003); *DeStefano*, 247 F.3d at 405; *Korioth v. Brisco*, 523 F.2d 1271, 1276-77 n.16 (5th Cir. 1975) (all applying *Flast* to state- or local-taxpayer standing).

Accordingly, the restitution remedy suggested by the Seventh Circuit likely applies to states and their programs. For example, a state taxpayer might sue to force a religious secondary school to repay tuition for dual-enrolled students if the program has insufficient safeguards against sectarian education. *Cf. Minn. Fed'n of Teachers*, 891 F.2d at 1355 (challenging policy allowing public high school students to attend religiously affiliated colleges at public expense). Or, a state taxpayer might not only seek to enjoin allegedly unlawful legislative prayers, but also demand that those who gave unlawful prayers in the past cough up the state-paid cost of correspondence and photographs they received in connection with the occasion. *See Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1105-06 (S.D. Ind. 2005). Indeed, as Notre Dame noted in its petition, *see* Pet. at 28, recoupment remedies for state-government Establishment Clause

violations are already springing forth. *See Ams. United for Separation of Church & State v. Prison Fellowship Ministries,* 432 F. Supp. 2d 862, 941 (S.D. Iowa 2006) (ordering a religious organization to repay to the State of Iowa the $1.5 million it received to provide prisoner-rehabilitation programs).

To be sure, most state programs that collaterally benefit religious institutions are, at least generally, fully consistent with current Establishment Clause doctrine. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 643-44 (2002) (holding that a school-voucher program does not violate the Establishment Clause); *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (holding that a federal act distributing funds used for educational materials in private schools does not violate the Establishment Clause); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3 (1993) (holding that the services of an interpreter to a disabled student attending a Catholic high school does not violate the Establishment Clause). That does not, however, foreclose the possibility that some state programs may be subjected to Establishment Clause challenges based on idiosyncratic flaws, such as a failure to provide adequate safeguards resulting in the use of a government grant for sectarian indoctrination. *See Mitchell*, 530 U.S. at 832; *Freedom from Religion Found., Inc., v. McCallum*, 179 F. Supp. 2d 950, 975-76 (W.D. Wis. 2002) (invalidating funding for a faith-based-treatment program that enabled governmental indoctrination of religion in violation of the Establishment Clause).

Given the nearly kaleidoscopic nature of Establishment Clause doctrine over the past few decades, there is no telling what the future may hold for these programs. *Cf. Mueller v. Allen*, 463 U.S. 388, 390-91 (1983) (permitting state income-tax credits for many parochial-school expenses); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973) (rejecting income-tax credits for parochial-school expenses); *Meek v. Pittenger*, 421 U.S. 349, 373 (1975)

(invalidating state-funded remedial help, speech therapy, hearing therapy, and counseling for private-school children); *Mitchell*, 530 U.S. at 808 (overruling *Meek*); *see also Agostini v. Felton*, 521 U.S. 203, 208-09 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), which barred public-school teachers being sent to parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program).

Due to the evolution of the doctrine, programs once assumed constitutionally sound might one day be adjudged to violate the Establishment Clause. Under the Seventh Circuit's standard, such programs could conceivably give rise to recoupment lawsuits against beneficiaries who long ago exhausted the government's largesse.

2. The implications for state sovereignty are ominous. Even if an elected state official decides against seeking recoupment of grants that allegedly violated the Establishment Clause, disgruntled taxpayers of any sort—potentially including transients whose only connection to a state is to have purchased items and paid state sales taxes—may use federal-court power to force reimbursement of the state treasury. This essentially casts electoral accountability aside and creates an army of private attorneys general who may review past state-government expenditures and then sue for recoupment of any that might have violated the Establishment Clause. Even more unsettling, taxpayer-plaintiffs and grant-recipient defendants could apparently negotiate their own settlements and determine how much of the allegedly unlawful grant, if any, should be returned to the state treasury.

As Judge Sykes observed in her dissent, the majority's decision vests "taxpayers with a unique sort of qui tam-like authority to sue private parties for reimbursement of the Treasury when the government is alleged to have committed an Establishment Clause violation." Pet. App. at 15 (Sykes,

J., dissenting). Yet this new, judicially created constitutional *qui tam* action lacks any of the procedural safeguards accompanying statutory *qui tam* actions, such as limits on the number of lawsuits seeking recovery for the same loss, and government authority to approve settlements. *Cf.* 31 U.S.C. § 3730.

Judicial supervision of a co-equal branch of the federal government is bad enough. But to apply that power to states offends well-established notions of comity and federalism. Management of fiscal resources is a core function of a sovereign government. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 60 (1994) (O'Connor, J., dissenting) ("If a State were vulnerable at any time to retroactive damage awards in federal court, its ability to set its own agenda, to control its own internal machinery, and to plan for the future—all essential prerequisites of sovereignty—would be grievously impaired."). As co-sovereigns, states should not be subjected to loss-prevention directives of federal courts. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985). Maintaining proper limits on state-taxpayer lawsuits is necessary to prevent federal courts from becoming state fiscal monitors. *See DaimlerChrysler Corp. v. Cuno*, __U.S.__, 126 S. Ct. 1854, 1864 (2006).

At the very least, such subversion of state/federal comity principles should not occur without intervention and full consideration by this Court. Review is warranted to ensure that federal courts remain within the limits of their proper judicial role when adjudicating Establishment Clause cases.

3. Churches and other faith-based organizations have become vital conduits to citizens for state social programs. *See, e.g.*, Ind. Code § 12-18-4 *et seq.* (implementing state domestic-violence policy through the Domestic Violence Prevention and Treatment Fund, a grant program for which religious organizations can qualify). The rule announced by the Seventh Circuit in this case, however, may deter

involvement by religious groups in the effectuation of state policy. Many faith-based groups already resist participation in government programs because of the administrative headaches involved and because they fear government directives affecting their mission work and other religious exercises. *See* Nadine Strossen, *Religion & the Constitution: A Libertarian Perspective*, 2006 Cato S. Ct. Rev. 7, 42 (2006). The added prospect that they might one day have to reimburse the state for grants that they receive under a program ultimately deemed unlawful—even if under an Establishment Clause standard that does not exist now but may exist years or even decades from now—may be too much risk for many of these groups to bear.

In this manner, the decision below threatens not only state-fiscal-management policies and abstract sovereignty interests, but also the effectuation of states' concrete social policies. Federal courts should not have the power to manage states in this manner—at least not without first having their expansive theories of taxpayer standing subjected to plenary review by the Court.

II. This Case and *Grace* Demonstrate the Need to Revisit Establishment Clause Taxpayer-Standing Doctrine

Over the past 35 years, the narrow rationale for allowing taxpayer standing in Establishment Clause cases, which was never very clear to begin with, has been lost amidst a general expansion of federal-court power. In many circumstances, lower federal courts have uncritically treated the invocation of taxpayer status in Establishment Clause cases as a mantra signaling entitlement to Article III standing. *See* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L. J. 771, 824 (2003) (observing that a taxpayer who brings an Establishment Clause claim has an 80% chance that he will be granted standing by a federal district court); *see also Hinrichs v. Bosma*, 440 F.3d 393, 396-97 (7th Cir. 2006)

(preliminarily approving state-taxpayer standing despite the lack of any marginal government expense supporting the allegedly unconstitutional features of legislative prayers).

The general result of this cavalier view toward state-taxpayer standing has been to disconnect adjudication of Establishment Clause disputes from the exercise of genuine Article III "judicial power." "[O]ver the course of the last two decades, the time when the federal courts allegedly closed their doors to taxpayers, at least three hundred taxpayer lawsuits have made their way into court." *See* Staudt, *supra,* at 773-74. Unsurprisingly, federal district courts have enabled this high number of lawsuits by granting state taxpayers standing outside the traditional limits of *Flast. See id.* at 819 (noting that federal district courts have granted taxpayers standing to bring under the Equal Protection and Due Process Clauses). Many courts do not even address standing when taxpayers are the plaintiffs. *See id.* at 814; *see also LSS Leasing Corp. v. United States Gen. Servs. Admin.*, 579 F. Supp. 1565, 1572 n.6 (S.D.N.Y. 1984); *Coal. to End Permanent Congress v. Runyon*, 796 F. Supp. 549, 558 n.8 (D. D.C.), *overruled* 971 F.2d 765 (D.C. Cir. 1992).

With its decisions in this case and in *Grace*, the Seventh Circuit has exposed the logical consequences of this constitutionally unsound trend. In *Grace*, the court blithely extended the set of government actions vulnerable to taxpayer Establishment Clause challenges to include executive-branch actions. *See Freedom from Religion Found., Inc. v. Chao,* 433 F.3d 989, 996 (7th Cir. 2006), *petition for cert. filed,* 75 U.S.L.W. 3065 (No. 06-157, Aug. 1, 2006). Here, the Seventh Circuit invented a new remedy utterly unconnected to the rationale for taxpayer standing in a strained effort to keep the case alive. *See* Pet. App. at 7-8. Permitting taxpayers to force grantees to disgorge unlawful receipts, particularly when the government eschews such recovery, has no connection to the historical concern for

enjoining unlawful spending itself. It is the act of taxing and spending, not the loss of the money, that causes the justiciable offense. *See Flast v. Cohen*, 392 U.S. 83, 102-03 (1968). Hence, recovering the money does not redress an Establishment Clause injury in the way that enjoining the act of spending does. *See DaimlerChrysler Corp. v. Cuno*, __U.S.__, 126 S. Ct. 1854, 1865 (2006) ("[A]n injunction against the spending would of course redress *that* injury . . . .").

This is a hazy distinction, so perhaps it was inevitable that courts would unfasten taxpayer standing from its animating principle. There is a natural tendency to view the injury as premised on the idea that government costs—expenditures and foregone tax revenues alike—injure taxpayers by increasing their tax burdens, however minutely. Yet the Court has rejected that view many times, from *Valley Forge*, where it held that the Establishment Clause does not limit the property disposition power, to last term's decision in *DaimlerChrysler*, where it rejected taxpayer standing in a Commerce Clause challenge to a tax-credit program. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 468, 480 (1982); *Daimler-Chrysler*, 126 S. Ct. at 1865.

The bottom line is that the fuzzy logic permeating taxpayer-standing doctrine provides lower courts with insufficient guidance as to when recognizing taxpayer standing ceases to serve legitimate purposes. As a result, the Seventh Circuit justified its decision to expand Establishment Clause relief to include restitution to the constitutional *violator* because it believed that such relief is necessary to make taxpayers whole. *See* Pet. App. at 7-8. That may make sense if what counts is the loss of money owing to unlawful spending—but then so would taxpayer standing in Commerce Clause challenges. The rule makes no sense, however, if what counts is the *act* of taxing and then spending contrary to limits understood by the Framers.

Besides, the hypothetical ability of even a new resident to force a disfavored grantee to return unlawful grants from years ago demonstrates that being a taxpayer plaintiff is no longer about obtaining genuine relief so much as vindicating political viewpoints.

Across the nation, taxpayer Establishment Clause challenges to common government programs—even activities as seemingly innocuous as the Pledge of Allegiance—continue to mount. *See Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1 (2004) (challenge to recitation of the Pledge of Allegiance in school); *Am. Jewish Congress v. Corp. for Nat'l Cmty. Serv.*, 399 F.3d 351 (D.C. Cir. 2005) (challenge to federally chartered corporation's AmeriCorps Education Awards Program, a nationwide community-service program); *Noresky v. Goord,* 120 Fed. Appx. 384 (2d Cir. 2005) (challenge to state department of corrections' use of prisoner work crews to perform renovation of church); *ACLU of Ohio Found., Inc. v. Ashbrook,* 375 F.3d 484 (6th Cir. 2004) (challenge to judge's courtroom display of Ten Commandments); *Hinrichs,* 400 F. Supp. 2d at 1105-06 (S.D. Ind. 2005) (challenge to Indiana's legislative prayer).

It is therefore necessary for the Court to consider whether taxpayer-standing doctrine maintains fidelity to Article III or instead has become an increasingly meandering detour from bedrock constitutional principles. At the very least, the Court needs to explain the doctrine of taxpayer standing in a way that permits consistent, principled application in future cases. If the Court does not untie the taxpayer-standing knot now, the doctrine will ultimately "interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts." *DaimlerChrysler*, 126 S. Ct. at 1864 (internal quotations omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* THE THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

TMLC concurs in the first question presented by the Petitioner.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, *Amicus Curiae* Thomas More Law Center states that it is a not-for-profit corporation, it does not have a parent corporation, and no public corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The Thomas More Law Center ("TMLC") is a national, public interest law firm dedicated to the sanctity of human life, religious liberty, and time-honored family values as seen in light of the Roman Catholic tradition.[1] In furtherance of this goal the TMLC engages in public interest litigation, public education, and related activities. The TMLC has an interest in the issues raised by the Petitioner because the decision rendered by the Seventh Circuit in *Laskowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006), has been used against TMLC's client, Kentucky Baptist Homes For Children, in connection with litigation pending in the United States District Court for the Western District of Kentucky, styled *Pedreira, et al. v. Kentucky Baptist Homes For Children, et al.*, 3:00-CV-210-S. TMLC respectfully submits that consideration of the vicious implications that the *Laskowski* decision has for organizations that partner with government for the purpose of delivering social welfare services demonstrates that this Court must reject the extension of taxpayer standing, and resulting abuse of judicial power, authorized by the decision below.

In the *Pedreira* litigation, TMLC represents Kentucky Baptist Homes For Children (KBHC), a faith-based organization which contracts with the Commonwealth of Kentucky for the benevolent purpose of providing care to wards of the Commonwealth. KBHC has a long and exemplary tradition of caring for those whose lives and dignity have been jeopardized by the vicissitudes of life.[2] The

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[1] Pursuant to Rule 37(2)(b), the *amicus* states that counsel for Notre Dame, Laskowski, and the Solicitor General have kindly consented to the filing of this *amicus* brief.

[2] General information about KBHC can be found at its website: http://www.kbhc.org/our_history.php; http://www.kbhc.org/.

institution was founded in 1869 by a group of women from the Walnut Street Baptist Church in Louisville, Kentucky in order to assist the widows and orphans left in the wake of the Civil War. Three children were received into the Louisville Baptist Orphan's Home on June 30, 1869, and KBHC has cared for children ever since that day. KBHC also preserved its connection to the Kentucky Baptist Convention, recognizing that it was this religious community that engendered the charitable impulse from which came all KBHC's good works.

In the 137 years since the Louisville Baptist Orphans' Home was founded, its commitment has remained constant: it strives to "extend the grace and hope of God as Jesus did by meeting the physical, emotional, and spiritual needs of those in its care." And KHBC has grown greatly from its humble origins. At present, KBHC has more than ten different facilities that provide services ranging from traditional care for children, counseling and treatment centers, foster care, and emergency shelters, to programs that focus on family preservation and reunification.

Despite tremendous growth in its ability to help the needy, KBHC has remained true to the magnificent charitable impulse of its founders, those Baptists women who loved God and wanted to serve their fellow man. KBHC recognizes that "[w]hile the needs of Kentucky's children and families have changed over the last 137 years, KBHC's commitment continues: "We are to extend the grace and hope of our loving God as Jesus did, meeting the physical, emotional and spiritual needs of those in our care."

The devotion and hard work inspired by this commitment has decided benefits for troubled children and youths. In fiscal year 2003-04, KBHC's work improved the lives of

more than 2,800 children and adults. Each day KBHC cares for over 300 children and teens.

KBHC's good work is achieved through a combination of public and private funds. KBHC's public funding comes in the form of contractual payments from the Commonwealth of Kentucky for shelter and other assistance provided to children and teenagers from at-risk backgrounds who become wards of the state.[3] The *per diem* payments that the Commonwealth makes to KBHC account for about 65 percent of the actual cost incurred to care for these children. The remainder of the funds used by KBHC to assist those in need comes from private donations.

Tragically, the Seventh Circuit's decision is *Laskowski* jeopardizes the very existence of KBHC, and all of the good work it does for children, teens, women, and families.[4] After the Seventh Circuit rendered its decision, the plaintiffs sought leave to amend their Complaint adding as "requested relief" a request for an order forcing KBHC to return the funds paid by the Commonwealth to KBHC for care provided to wards of the state. *Laskowski* was cited to support the effort to secure "restitution" for the Commonwealth of Kentucky.

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[3] Details about the *Pedreira* litigation are available via electronic access to the pleadings and papers in the court file for the United States District Court for the Western District of Kentucky. *Pedreira et al. v. Kentucky Baptist Homes For Children, et al.*, Docket No. 3:00-cv-00210. See docket entry 1: Complaint; entry 82: KBHC's Motion For Judgment on the Pleadings.

[4] Cf. Docket entry 1 [Complaint]; entry 94 [Amended Complaint]; entry184 [Second Amended Complaint]; entries 192, 193, 198 [briefing regarding amended complaint].

As KBHC's predicament illustrates, the request for "restitution" authorized by *Laskowski* is a destructive legal fiction. KBHC does not make a profit and the funds that the plaintiffs want "restored" to the Commonwealth of Kentucky have already been spent caring for the needy. Thus, the funds required to make "restitution" if the court were to find a violation of the Establishment Clause will have to come from KBHC's private funds.

The effort to "recoup" funds KBHC spent helping others would be risible if its impact were not so rapacious. As a result of the plaintiffs' request for "restitution" KBHC is now confronted with exposure to a liability of somewhere from $30 to $100 million dollars–a liability that will bankrupt KBHC. In this way, the "restitution" remedy authorized by *Laskowski* makes it possible for a handful of taxpayers to threaten the existence of a laudable 137 year old work of mercy. KBHC confronts this grave risk because it accepted funds with the hope of helping more families in need, but these taxpayer plaintiffs–in their new capacity as Article III private attorneys general–may manage to secure a retrospective finding that certain expenditures ran afoul of the Establishment Clause.

TMLC submits this brief because no organization should be forced to risk its existence in order to participate in programs designed to serve the poor. And the ability of government to partner with private organizations for the purpose of rendering social welfare assistance should not be jeopardized by capricious "enforcement" actions undertaken by private taxpayers to "recoup" monies for the public purse from which they will receive no particular benefit.

STATEMENT OF THE CASE

TMLC adopts the Statement of the Case as presented by Petitioner.

INTRODUCTION TO THE ARGUMENT

As Petitioner, The University of Notre Dame, has demonstrated, the Seventh Circuit's decision in *Laskowski* defies bedrock principles of constitutional law designed to ensure that judicial power is exercised in a manner consistent with the separation of powers. Once the case below became moot by virtue of expiration of the grant and expenditure of the funds, there was no case or controversy sufficient to support an order halting an ongoing use of public funds. From this it follows that the dispute was moot and did not provide grounds for an exercise of judicial power because, as the Seventh Circuit recognized, the injury caused by the unlawful expenditure had already occurred and could not be undone. The Seventh Circuit also recognized that it was beyond the judicial power to order the executive branch to recover funds for the treasury. But–inexplicably–the Seventh Circuit departed from countless principles of law identified by Notre Dame and authorized a private plaintiff to act for the government in order to recoup funds for the public purse.

Notre Dame has demonstrated the many ways in which the Seventh Circuit's decision defies longstanding doctrines designed to ensure that federal courts exercise only judicial–not executive or legislative authority. By authorizing a private plaintiff to seek a remedy that does not redress the injury to the plaintiff in any meaningful sense, the Seventh Circuit moved beyond the legitimate exercise of judicial power, usurping the legislative power to determine when private citizens shall be vested with authority to recover

monies for the federal government as well as the executive power to recoup moniés for the public fisc.

As KBHC's cruel predicament demonstrates, *see Interest of the Amicus*, the Seventh Circuit's extension of taxpayer standing to include a power to recover money for the public treasury creates a risk that FBOs may jeopardize their very existence if they partner with government. Because it is certain that the burden created by the decision below will fall most heavily on those organizations with a religious dimension, TMLC seeks to give this Court some sense for adverse impact that the *Laskowski* decision will have on the "Charitable Choice" legislation enacted by Congress and the President's Faith-Based and Community Initiatives program.

ARGUMENT

This case presents squarely an important question of law never directly decided by this Supreme Court. That question is whether taxpayers who have standing to advance a claim under the Establishment Clause have been given license by this Court's decision in *Flast v. Cohen*, 392 U.S. 83 (1968), to seek a particular remedy, i.e., recoupment of money for the public fisc. This Court should answer that question in the negative.

The reasons this Court should deny the expansion of taxpayer standing to include standing to seek "recoupment" benefitting the public purse are several. First, the rule in *Flast* is a narrow exception to the general rule that taxpayers have no right to challenge expenditures of public funds, an exception that has always been narrowly construed precisely because it threatens a direct conflict with the unquestioned power of the legislative branch to tax and spend for the general welfare, something this Court recognized in *Flast*; *see*

also Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

Second, judicial decisions allowing individual citizens to seek remedies on behalf of the general public where, as here, the monies are allocated for a legitimate public purpose, threatens to place the judicial branch in direct conflict with the executive branch, which has the duty to see that the laws are faithfully executed. *See, e.g., Heckler v. Chaney*, 470 U.S. 821 (1985). As demonstrated below, the decision to seek recoupment for a use of public funds inconsistent with federal law necessarily involves a discretionary judgment with far reaching implications for public policy. The taxpayer standing allowed under *Flast* should not be expanded so as to allow private taxpayer-plaintiffs to threaten public policy based on an alleged violation of the Establishment Clause that is moot because such a rule usurps the discretion entrusted to the executive branch.

Third, authorizing taxpayers to seek recovery for the public fisc creates a situation ripe for abuse. Simply put, the rule authorizes private individuals who will secure no tangible benefit from any repayment to the public treasury to undertake an enforcement action that will do much harm to those who benefit from social welfare programs subject to the sort of challenge advanced by the plaintiffs in the *Laskowski* litigation. Granting individual taxpayers such authority–where there is no incentive for restraint and great risk of harm to the common good–strains the limited standing allowed by *Flast* beyond the breaking point.

Taken together these considerations require review and, ultimately, rejection of Seventh Circuit's holding that individual taxpayers have standing to pursue a recoupment remedy on behalf of the public purse. It is fundamental that

plaintiffs must demonstrate standing for each remedy sought. *Daimler Chrysler Corp. v. Cuno*, 126 S.Ct. 1854 (2006). And it is fundamental that the judicial power can only be employed in cases where it can provide meaningful redress for a harm suffered by the plaintiff–not a generalized financial benefit inuring to the public fisc. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). For this reason, this Court has already rejected an effort to recover value for the public fisc based on an alleged violation of the Establishment Clause. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

This Court should likewise reject the effort by private taxpayer–plaintiffs to recover value for the public treasury presented in this case. By severing the taxpayer standing allowed under *Flast* from any meaningful connection to redress for the taxpayer–plaintiff, the decision below creates a cruel irony. Just as it is certain that the "relief" authorized by the Seventh Circuit will not benefit any taxpayer-plaintiff, it is quite certain that the Seventh Circuit's decision will harm many of our most vulnerable citizens by discouraging FBOs from participating in federal programs designed to serve those in need. TMLC writes to highlight this public policy problem for this Court because there is a human dimension to the proper resolution of the legal issue raised by Notre Dame. TMLC respectfully submits that consideration of the human costs that will surely follow from the decision below provides yet another reason to grant the requested writ and, upon plenary review, reverse.

I. By Authorizing Private Taxpayers To Seek Recovery For The Public Fisc The Decision Below Creates A Needless And Undesirable Conflict Between The Judicial Power And The Charitable Choice And Faith-Based Initiatives Of The Legislative And Executive Branches.

There is no question that the Seventh Circuit's decision will produce harm to many of our most vulnerable citizens by discouraging FBOs from providing benefits funded in part by federal grants. By empowering private plaintiffs to recoup monies from private party defendants for alleged violations of the Establishment Clause, the Seventh Circuit has introduced radical instability and risk into the administration of government grant programs. Now private organizations that might wish to cooperate with federal agencies to aid the unfortunate must run the risk that private taxpayer plaintiffs may seek "reimbursement" for the federal agency long after the actual funds at issue have been spent to deliver services.

This unjust result is egregious because the Seventh Circuit's extension of taxpayer standing to authorize so-called "recoupment" for the public fisc is nothing but a wicked fiction. After the grant money has been spent it is nonsensical to characterize the recoupment remedy authorized by the Seventh Circuit as "restitution." The real result of the decision below is not to recover public funds. This is obvious because insofar as a retrospective monetary recovery is concerned the funds will already have been spent providing services from which the charitable organization derives no profit. The case at bar is a case in point.

Once the hollow fiction of "restitution" is set aside, the grim reality comes into view. The real result of the decision below is to authorize private taxpayer-plaintiffs to drain

private donations from charitable organizations if a given taxpayer-plaintiff can persuade a federal judge that a given social service was linked too closely with religion.[5] Such a rule of law amounts to nothing more than a strict liability penalty levied against private charitable organizations for failure on the part of governmental entities to ensure compliance with the requirements of the Establishment Clause. There is no question that the risk of penalty resulting from the decision below will chill participation in government grant programs by FBOs. Worse still, that risk will undoubtedly chill private giving to organizations that accept public funds because private funds will necessarily be turned over to the public fisc as "restitution" upon any finding that a given use of public funds did not comply with the anything-but-unchanging dictates of Establishment Clause jurisprudence.

The instability and risk that the decision below introduces into the governmental programs granting funds to FBOs to perform social welfare services present a direct threat to the "Charitable Choice" legislation enacted by Congress and the Faith-Based and Community Initiatives program of the White House. Significantly both the "Charitable Choice" legislation and the "Faith-Based and Community Initiatives program proceed from the recognition that faith-based organizations play a large and vital role in the nations social safety net.[6]

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[5] Grants of other public funds cannot be used for this purpose because such grants require public funds to be used for the purpose of the grant.

[6] See, generally, http://www.whitehouse.gov/government/fbci/. For more information about the Charitable Choice and Faith Based and Community Initiatives programs see the following: http://www.whitehouse.government/fbci/background-overview.html & http://www.hhs.gov/fbci.

The White House has presented some telling evidence of the important role that FBOs play in promoting the general welfare of our great nation. More than two thirds of federally-supported residences for the elderly are operated by faith-based organizations. About one in every six child-care centers is housed in a religious facility and this number is growing faster than the overall rate for child-care centers. Religiously affiliated hospitals received more than $45 billion from government programs as early as 1998.[7]

It is noteworthy that appreciation for the important role played by FBOs in the delivery of social welfare services is bipartisan. An independent research project of the Rockefeller Institute of Government has acknowledged the vitally important role that FBOs play in delivering social services. During a research conference entitled "The Public Benefit of Private Faith: Religious Organizations and the Delivery of Social Services," one researcher noted that: "faith-based organizations provide important services in a local community; [FBOs] often are the largest social service agencies in a community."[8] Another study available through

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[7] See White House Publication, "Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government," at 2; available at http://www.whitehouse.government/fbci/background-overview.html.

[8] Transcript from 2003 Fall Research Conference of The Roundtable on Religion and Social Welfare Policy, an independent research project of the Rockefeller Institute of Government, entitled "The Public Benefit of Private Faith: Religious Organizations and the Delivery of Social Services," plenary session addressing "Comparative Views on the Role and Effect of Faith in Social Services," at 13. Available at: http://www.religionandsocialpolicy.org/dos/events/2003_annual_conference/11-13-2003_comparative_views_plenary.pdf.

the nonpartisan Urban Institute concludes that "FBOs are sometimes seen as more accessible to populations that are harder to reach by public bureaucracies or even large social service nonprofits. FBO accessibility may be a function of physical proximity or social standing in a community, of their size and the lessened burdens that come with smaller caseloads, or of the motivation of staff, perhaps driven by their own faith mission."[9] Other independent researchers have noted that although measurement is difficult due to a lack of data, there are good grounds to believe that FBOs offer an invaluable means of delivering services that are safe and satisfy important human needs. For example, a study of nursing home care found that church-related nursing homes had, on average, 25 percent fewer inspection deficiencies and 57 percent fewer complaint deficiencies than all other types of nursing homes.[10]

This Court should also know that there are over 170 programs which seek to enlist FBOs to further legitimate secular social welfare objectives in connection with "Charitable Choice" legislation and the President's Faith Based and Community Initiatives program.[11] The program

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[9] F. d. Kramer, K. Finegold, C.J. De Vita, L. Wherry, Faith Based Organizations Delivering Local Services, at 70 (July, 2005). Permanent link: http://www.urban.org/uri.cfm?ID=311197.

[10] See Mark Ragan, Faith-Based vs. Secular, Using Administrative Data to Compare the Performance of Faith-Affiliated and Other Social Service Providers, (December, 2004)(Executive Summary) available at http://www.religionandsocialpolicy.org/docs/transcripts/12-09-04_promise_and_performance.pdf.

[11] A non-exhaustive listing of programs can be found in Federal Funds for Organizations That Help Those in Need at http://www.whitehouse.gove/government/bci/catalogue.pdf.

areas are as vast and varied as the needs of our fellow citizens and represent a laudable effort to respect the dignity of each individual member of our nation from birth to death. For example, government programs addressing threats to children and youth range from abandoned infants assistance, services for abused and neglected children, adoption opportunities, foster grandparents, mentors of children of prisoners or "system-involved youth," runaway and homeless shelters, and efforts to combat exploitive child labor through education, to headstart and highschool equivalency programs. Public health programs include child survival and health grants, community health centers, and rural health care services outreach. Program efforts in the area of housing include housing counseling programs, mutual self-help housing grants, self-help home ownership opportunity programs, home investment partnership programs, domestic violence transitional housing assistance programs, and emergency shelter grants as well as homeless services. Other program areas address everything from educational outreach and economic development to crime prevention and victim services. And there are programs for "elders in need" such as the resident opportunities self-sufficiency program, assisted living and continuum of care programs. The point here is that both Congress and the President have asked FBOs to partner with government in a wide variety of critically important areas.

FBOs play an increasingly important role in the delivery of social welfare services by the federal government as a result of the Charitable Choice legislation and the President's Faith-Based and Community Initiatives program. In fiscal year 2005, grants to FBOs totaled over $2.15 billion. Significantly, FBOs partner with a wide range of federal departments delivering services designed to promote public health, education, and welfare. In fiscal year 2005, HHS grants to FBOs totaled $780,491,043. Grants from USAID

to FBOs totaled $591,047,452. Grants from HUD to FBOs totaled, $520,961,223. Grants from USDA to FBOs totaled $153,687,577. Grants from DOJ to FBOs totaled $70,029,600. Grants from DOL to FBOs totaled $20,346,578. Grants from ED totaled $17,682,773. Moreover, funding levels continue to increase.[12]

In sum, Congress' Charitable Choice legislation and the President's Faith-Based and Community Initiative program demonstrate that both the legislative and executive branches seek to enlist FBOs in the vast array of humanitarian efforts sketched above. There is good reason to believe that FBOs are particularly well suited to promote legitimate social welfare goals. And there is good reason to believe that FBOs are responding to these initiatives–a development which promises to promote the general welfare.

This data concerning the important contributions that FBOs make to our social safety net provides yet another good reason for this Court to review and ultimately reverse the Seventh Circuit's unprecedented holding that individual taxpayers have standing to seek a so-called recoupment remedy for the public treasury. Such a rule of law is deeply flawed. It allows individual citizens to invoke the judicial power to seek a remedy that provides no meaningful benefit to the taxpayer-plaintiff, but does a great deal of harm to the

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[12] See White House Publication, "Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government," at Table "Faith Based Organizations Receive Over $2.15 Billion in Funding...." & Table "Funding to Faith-Based Organizations Continues to Increase." See also, L. Montiel, Getting A Piece of the Pie: Federal Grants to Faith-Based Social Service Organizations," February, 2006, and available online at The Roundtable on Religion and Social Welfare Policy.

common good by forcing FBOs asked to partner with government to accept unpredictability and risk in order to serve the general welfare. The rule is also unjust because any court-ordered "recoupment" is nothing less than a levy on private funds donated to an FBO partnering with government for an alleged violation of the Establishment Clause–even though it is the government that is obliged to comply with the dictates of constitution while FBOs are (and must remain) free to spend their private monies as they please. There is no question that such a rule of law will discourage participation in governmental grant programs by FBOs and will discourage private donations to FBOs partnering with government for charitable purposes. In these ways, the decision below undermines the legitimate policy initiatives of both the legislative and executive branches. A moment's reflection demonstrates that whatever short-term benefit such a rule might provide to the public fisc is far outweighed by the long term loss to the general welfare that will surely follow from it.

CONCLUSION

The Seventh Circuit's extension of taxpayer standing so far as to authorize private taxpayer-plaintiffs to seek a so-called "recoupment" from private defendants for the benefit of the public fisc is supported by neither law nor reason. By authorizing a remedy that will provide no meaningful benefit to the taxpayer-plaintiff in connection with a moot Establishment Clause claim, the decision below violates longstanding limitations on federal jurisdiction which serve to prevent the judicial power from intruding into matters entrusted to the coordinate branches of government. By authorizing private citizens to seek "restitution" of monies for the benefit of the public fisc, the decision below introduces unpredictability and risk into the grant administration process

that will inevitably chill the participation of FBOs in federal grant programs and, consequently, undermine public policy objectives of both Congress and the President. These results, which follow directly from the decision below, provide further proof that by disregarding the limits of taxpayer standing and the requirement of redressability, the Seventh Circuit moved beyond the scope of the judicial power and into the realms of policy-making and enforcement discretion entrusted to the legislative and executive branches. Such an illicit expansion of taxpayer standing and the judicial power should be rejected. For these reasons, the TMLC respectfully submits that the petition should be granted and, upon plenary review, the decision below should be reversed.

Respectfully submitted,

This 27th day of November, 2006

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IN THE

Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME,

Petitioner,

v.

JOAN LASKOWSKI, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* WE CARE AMERICA, EVANGELICALS FOR SOCIAL ACTION, CENTER FOR NEIGHBORHOOD ENTERPRISE, AND THE CENTER FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONER

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White House Office of Faith-Based and Community Initiatives, *Grants to Faith Based Organizations for Fiscal Year 2005* (2006) http://www.whitehouse.gov/government/fbci/final_report_2005.pdf 7

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INTEREST OF AMICI IN THIS CASE[1]

Each of the amici is a Faith-Based Organization that has received public funding or is an organization that works to promote public funding of Faith-Based Organizations. The work of these amici may be severely impacted by the Seventh Circuit's decision that bases an Establishment Clause plaintiff's standing solely on a claim for restitution against Faith-Based Organizations. Each of the amici is described specifically as follows.

WE CARE AMERICA is an organization dedicated to strengthening Faith-Based and Community organizations by supporting and leveraging public, corporate, and private support. We Care America has affiliates in 28 states, many of which are located within the Seventh Circuit's jurisdiction.

EVANGELICALS FOR SOCIAL ACTION ("ESA") is an association of Christians seeking to promote Christian engagement, analysis and understanding of major social, cultural and public policy issues. ESA intersects with Faith-Based Organizations all over the country, many of which are located within the Seventh Circuit, in an effort to promote social justice and attend to the needs of the nation's poor and marginalized.

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[1] All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

CENTER FOR NEIGHBORHOOD ENTERPRISE ("CNE") provides effective community and faith-based organizations with training and technical assistance and links them to sources of public and private support. CNE's grassroots network includes many organizations located within the Seventh Circuit's jurisdiction. Societal problems addressed by this network include youth violence, substance abuse, teen pregnancy, homelessness, joblessness, education of the poor, and rebuilding deteriorating neighborhoods.

CENTER FOR PUBLIC JUSTICE is a public policy and leadership organization that has been at the forefront of the movement to promote cooperation between government and institutions of civil society, including Faith-Based Organizations, in the fight against poverty. The Center was a key supporter of Congress' "Charitable Choice" provision of the 1996 welfare reform law. Charitable Choice makes it possible for Faith Based Organizations to cooperate with the government in providing family counseling, job training, and other services to those who need them. The Center continues to assist state officials and religious leaders across the country, some of whom work within the jurisdiction of the Seventh Circuit, to understand how to best utilize Charitable Choice.

SUMMARY OF THE ARGUMENT

The Seventh Circuit's decision below threatens to greatly diminish Faith-Based Organizations' ("FBOs") cooperation with government in providing much needed social services. For the first time FBOs are made the focuses of Establishment Clause challenges instead of the government. This involves a twofold threat. First, FBOs will have to endure protracted and expensive litigation even when there is no Establishment Clause violation. Second, every government grant that an FBO accepts will perpetually be at risk of an action for restitution. The risk of being the center of a lawsuit for a grant received and spent *years earlier* will prove too much to bear for many FBOs that will simply choose to forgo government funding. That outcome is to the detriment of the government, FBOs, and, most importantly, those who are in need of the assistance that these FBOs offer.

The Seventh Circuit attempts to ameliorate the effects of its decision by stating that an FBO will be liable for restitution only if it "knew or should have known" that it was receiving an unconstitutional grant. But the Seventh Circuit's superimposition of the equitable doctrine of restitution onto Establishment Clause cases is a bad fit. It leaves FBOs in a very untenable position by requiring them to be able to accurately discern when the government is violating the Establishment Clause. In these cases there is no allegation that the FBO has acted illegally or has violated the conditions of the grant. FBOs rely on government officials to design the grant in a manner that complies with the constitution. To require FBOs to accurately discern constitutional wrongdoing in such a fact-specific and fluctuating area of law is neither reasonable nor workable.

The Seventh Circuit's decision involves an important question of federal law and is inconsistent with the decisions of this Court. It turns the Establishment Clause into a personal constitutional right, drains Article III's standing requirements of meaning, and involves the government in more entanglement with religion, not less.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Decision Will Severely Chill FBOs' Cooperation With Government To Provide Much Needed Social Services.

The social safety net in the United States would collapse without the assistance of private, Faith-Based Organizations. The White House Office of Faith-Based and Community Initiatives has reported that:

> [R]eligious organizations represent a major part of the American welfare system. Tens of thousands of people in the Philadelphia area are being helped by all kinds of programs, from soup kitchens to housing services, from job training to educational enhancement classes. One can only imagine what would happen to the collective quality of life if these religious organizations would cease to exist.

White House Office of Faith-Based and Community Initiatives, *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs* 3 (2001) www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf (quoting Ram A. Cnaan, with Robert J. Wineburg and Stephanie C. Boddie, *The Newer Deal: Social Work and Religion in Partnership* 275 (1999)). This charitable work ranges from prisoner reentry programs to housing for the

elderly and homeless, to soup kitchens, job training and AIDS shelters. *Id.* In short, the breadth of social services provided by FBOs spans almost every sector of society's needy. Much of the funding that supports these organizations is private, but FBOs also receive significant funding from the government. *Id.*

But the effectiveness and vitality of these organizations in assisting the federal government is placed in real jeopardy by the Seventh Circuit's decision in *Laskowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006). As the Office of Faith-Based and Community Initiatives has found, FBOs already "often face serious managerial and political obstacles" to helping fulfill "the Nation's social agenda." *Unlevel Playing Field*, at 3. FBOs must wade through the bureaucratic red-tape that accompanies government programs, jump through extra hoops because they are faith-based, worry how their religious-based hiring policies will open them to liability, and endure restrictions on their religious activities that are not prohibited by the Constitution. *Id.* at 1-3. The Office of Faith-Based and Community Initiatives has found that many of the obstacles that are erected specifically for FBOs are often based not on the law, but instead a public official's overly-cautious view of what restrictions must be placed on FBOs. *Id.* at 10-11.

The Seventh Circuit's decision represents a new threat for faith-based charities that choose to cooperate with the government. Now, for the first time, FBOs, not the government, are made the focuses of Establishment Clause challenges even though they have engaged in no wrongdoing. The Seventh Circuit described this new doctrine as simply "cutting out the [government] middleman." *Id.* at 935. Under the Seventh Circuit's ruling, an FBO can now be hauled into court based not on what the charity has done, but instead on what a third party presumes

that the government has done. Armed with a Freedom of Information Act ("FOIA") request and a vague allegation of constitutional wrongdoing, Establishment Clause plaintiffs are able to force FBOs to divert limited resources from helping those in need to paying out legal fees to defend against Establishment Clause lawsuits, even when those suits are meritless. Normally, if an Establishment Clause plaintiff seeks an injunction against a government grant to an FBO, the FBO can sit on the sidelines and wait for a decision by the court. After all, it is not the FBO that is acting unconstitutionally. The FBO is relying on the government to structure the grant in a way that complies with the Constitution. Under the Seventh Circuit's decision, an FBO will now find itself in the middle of the lawsuit as a defendant for a grant that it had already relied upon and spent. The knowledge that a grant, once taken, can be the subject of an action for restitution years later will likely make seeking government funding for charitable work more trouble than it is worth for many FBOs.

Of those Faith-Based Organizations that continue to accept government funding, many will likely feel even more pressure to secularize all activities in order to avoid raising even the specter of an Establishment Clause problem. Such a system benefits neither the government nor the FBO, and inhibits the service of the nation's needy. Moreover, a policy that pressures FBOs to totally secularize their organizations runs counter to Congress' intent in creating the Charitable Choice program:

> The purpose of this section is to allow states to contract with religious organizations to accept certificates, vouchers or other forms of disbursement ...on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the

> religious freedom of beneficiaries of assistance funded under such programs.

42 U.S.C. § 604a (b) (emphasis added).

The number of government grants to FBOs is not negligible. A sampling of seven government agencies shows that over $2.15 billion dollars was awarded to faith-based charities in 2005 alone, totaling over 2,760 individual grants. White House Office of Faith-Based and Community Initiatives, *Grants to Faith-Based Organizations for Fiscal Year 2005* (2006).[2] Although this is only a fraction of the nearly $20 billion in funding available to private entities in 2005, plaintiffs like those in *Laskowski* are now able to rummage through thousands of individual government records to find what they believe could be an Establishment Clause violation.[3] Under the Seventh Circuit's decision, any one of the thousands of government grants to FBOs over the years can now be the subject of an Establishment Clause case for restitution.

II. The Seventh Circuit's Decision Unreasonably Requires FBOs to "Know" When the Government Is Violating the Establishment Clause.

The *Laskowski* majority attempted to blunt the effect of its decision by stating that an FBO or other private religious organization would only be held liable for restitution for a grant that "it knows or should know was wrongfully obtained." *Laskowski v. Spellings*, 456 F.3d 702, 704 (7th Cir. 2006) (denying rehearing) (citing Lord Goff &

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[2] http://www.whitehouse.gov/government/fbci/final_report_2005.pdf (last visited November 20, 2006).

[3] By comparison, secular non-profits were awarded nearly $12.7 billion in 2005. *Id.*

Gareth Jones, *The Law of Restitution* § 40-018 (6th ed. 2002)). This does little to reassure amici. Although it is unclear how this defense against a claim for restitution would even apply in an Establishment Clause case, the Seventh Circuit's "solution" requires FBOs to do the impossible: accurately predict when the government is violating the Establishment Clause.

Members of this Court have candidly acknowledged that "in respect to the First Amendment's Religion Clauses . . . there is 'no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.'" *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 2868 (2005) (Breyer, J., concurring in judgment) (quoting *School Dist. Of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). Indeed, Establishment Clause jurisprudence has proven to be one of the most unpredictable areas of American law. Since at least the decision in *Everson v. Board of Ed. Of Ewing*, 330 U.S. 1 (1947), this Court has struggled to find a consistent Establishment Clause test. As this Court has recognized, "[t]here is no exact science in gauging the entanglement of church and state." *Roemer*, 426 U.S. at 767. This Court has also noted that Establishment Clause challenges involve fact-specific inquiries that will often lead to varying results. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 607-608 (1989); *Van Orden*, 125 S.Ct. at 2689 ("no exact formula can dictate a resolution to such fact-intensive cases") (Breyer, J., concurring in the judgment).

It is not reasonable to expect an FBO to know with any degree of certainty whether an aspect of a government grant somehow violates the Establishment Clause when this Court and the federal courts of appeal are unable to come to

any consensus. Although it appears that the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), remains the dominant Establishment Clause test, the Court has also "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 465 U.S. 668, 679-81 (1984). This Court has applied several different tests to Establishment Clause cases. *See Lynch v. Donnelly*, 465 U.S. 668 (1984) (endorsement test); *Lee v. Weisman*, 505 U.S. 577 (1992) (psychological coercion test); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) (neutrality test); and *Marsh v. Chambers*, 463 U.S. 783 (1983) (historical test). And several justices have explicitly questioned *Lemon's* continued value. *See, e.g., McCreary County Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 125 S.Ct. 2722, 2751 (2005) (Scalia, J. dissenting) (citing instances in which Scalia, J., Thomas, J., Kennedy, J., O'Connor, J., Rehnquist, C.J., and Stevens, J., expressed criticism of *Lemon*). Nonetheless, no test has yet conclusively supplanted *Lemon*.

Several circuits have noted that *Lemon* is not well-suited to predictable outcomes in cases involving the religion clauses. *See, e.g., Barnes v. Cavazos*, 966 F.2d 1056, 1063 (6th Cir. 1992) ("The *Lemon* test has received criticism from virtually every corner and we add our voices to those who profess confusion and frustration with *Lemon's* analytical framework."); *City of Zion v. City of Rolling Meadows*, 927 F.2d 1401, 1419 (7th Cir. 1991) ("Applying *Lemon* . . . to religious symbols on city seals is no cakewalk. *Lemon's* 'three-part test' is not a test. It is a triad of questions, the answers to which conflict in all interesting cases."); *see also Rusk v. Crestview Local Schs.*, 220 F.Supp.2d 854, 856-57 (N.D. Ohio 2002) ("The *Lemon* test has attracted criticism due to the lack of explicit language and confusion in applying it to specific scenarios.").

The recent Ten Commandments decisions by this Court highlight the confusion FBOs face in trying to gauge whether the government is violating the Establishment Clause. In *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 125 S.Ct. 2722 (2005), the Court found, in a plurality decision, that the public display of the Ten Commandments in two Kentucky courthouses violated the Establishment Clause. However, in *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854 (2005), the Court found, in a plurality decision, that a public display of the Ten Commandments on the Texas State Capitol grounds did not violate the Establishment Clause. The plurality in *McCreary* applied the *Lemon* test in finding an Establishment Clause violation. *McCreary*, 125 S.Ct. at 2735-2736. The plurality in *Van Orden*, however, jettisoned *Lemon* in favor of an analysis "driven both by the nature of the monument and by our Nation's history." *Van Orden*, 125 S.Ct. at 2861 ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has created on its Capitol grounds"). Thus, the plurality in each case applied a different test and came to a different outcome regarding the public display of the Ten Commandments. In the end, only Justice Breyer thought that both decisions were rightly decided. *McCreary*, 125 S.Ct. at 2727; *Van Orden*, 125 S.Ct. at 2868 (Breyer, J., concurring in the judgment).

To expect FBOs to navigate through Establishment Clause jurisprudence with any degree of certainty is too much to ask, and does not give the reassurance that the Seventh Circuit majority suggests it should. Regardless of what one thinks the outcome of these Establishment Clause decisions should be, it is beyond dispute that they are highly unpredictable, even for constitutional scholars. Certainly an

FBO's liability for receiving grants long ago spent cannot turn on whether it "knew or should have known" that the Government was violating the Establishment Clause. The FBO relies on the government to structure the grant in a way that is constitutional. It cannot possibly be expected to be an expert on the vicissitudes of Establishment Clause jurisprudence. To require such prescience in as unpredictable a field as Establishment Clause cases is unreasonable and unworkable.

III. The *Laskowski* Decision Is Inconsistent With The Decisions of This Court.

The *Laskowski* decision brings to fruition two fears that members of the Court have previously expressed. First, it creates a very real potential that the Establishment Clause will become a "personal constitutional right." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482 (1982) (citations omitted). The Seventh Circuit's decision replaces *Flast v. Cohen's* "narrow exception ... to the general rule against taxpayer standing" with a gaping exception that would open the floodgates to an already thriving industry of Establishment Clause lawsuits. *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988). As Judge Sykes noted in her dissent in *Laskowski*, the majority vests "taxpayers with a unique sort of qui tam-like authority to sue private parties for reimbursement of the Treasury when the government is alleged to have committed an Establishment Clause violation." *Laskowski*, 443 F.3d at 939. "But assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Valley Forge*, 454 U.S. at 483. Surely the majority's decision in *Laskowski* is not what the Court envisioned when it granted the limited and narrow

exception to the prohibition against taxpayer standing in *Flast v. Cohen*, 392 U.S. 83 (1968). If it is consistent with *Flast's* holding, this Court should revisit whether *Flast* is consistent with Article III's standing requirements.

Second, putting FBOs at the center of a suit for restitution involves the government in more entanglement with religion, not less. In *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976), a plurality of the court addressed in passing the claim that funds could be recouped from private colleges, some of which were religious. The plurality noted that "[t]he funds in question here long since have been paid out to, and spent by, the colleges. As for the protection of the substantive constitutional rights, the separation of church and state may well be better served by not putting the State of Maryland in the position of a judgment creditor of the appellee colleges." *Id.* at 767. The Seventh Circuit's decision puts courts in the uncomfortable position of retroactively policing which funds must be repaid by Faith-Based Organizations into the federal treasury. Also, the Seventh Circuit's concept of "cutting out the middleman," *Laskowski*, 443 F.3d at 935, by focusing on the religious grant recipient instead of the government places the alleged constitutional wrongdoer, the government, as a sort of judgment creditor of the religious entity. Such a scenario heightens, not relieves, entanglement concerns.

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CONCLUSION

Amici respectfully request that this Court grant Notre Dame's Petition for a Writ of Certiorari to address whether a taxpayer's standing to pursue an Establishment Clause challenge can be based solely on a plaintiff's claim for restitution from a private religious entity on behalf of the government.

Respectfully submitted,

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